SUPREME COURT, U. S.

Supreme Court of the United States

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FILED
MAR 5 1969
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD,

Petitioner,

—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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CAPTAIN DALE E. NOYD,

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—v.—

MAJOR GENERAL CHARLES R. BOND, JR., Commander, Twelfth Air Force, United States Air Force; COLONEL GEORGE R. DOERR, Commander, 832nd Combat Support Group, and Commander, Cannon Air Force Base, New Mexico; COLONEL ROBERT R. SCOTT, Commander, 832nd Air Division, Cannon Air Force Base, New Mexico; COLONEL JIMMY J. JUMPER, Commander, 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico; LIEUTENANT COLONEL JAMES L. GLESSNER, JR., Commander, 524th Tactical Fighter Squadron, Cannon Air Force Base, New Mexico; CAPTAIN CHARLES THOMPSON, Commander, 832nd Security Police Squadron, Cannon Air Force Base, New Mexico,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The decision of the United States District Court for the District of New Mexico, Honorable H. Vearle Payne, Chief Judge, presiding, granting in part and denying in part a petition for a writ of habeas corpus, is reported at 285 F. Supp. 785 (D. N. Mex. 1968) and is printed in the Appendix, p. 16. The decision of the Court of Appeals for the Tenth Circuit reversing the District Court on jurisdictional grounds is reported at 402 F. 2d 441 (10th Cir. 1968), App., p. 22. The opinion of Mr. Justice Douglas, ordering petitioner released from incarceration pending certiorari, and staying respondents in the interim from certain acts, is reported at 89 S. Ct. 478 (Dec. 24, 1968), App., p. 27.[1]

Jurisdiction

The judgment of the Court of Appeals was entered on October 30, 1968. The petition for certiorari was docketed on December 13, 1968. Certiorari was granted on January 20, 1969, 89 S. Ct. 692. Jurisdiction is conferred on this Court pursuant to 28 U. S. C. §1254(1).

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[1] The language quoted by Mr. Justice Douglas in framing the terms of the stay is from the decision of Hon. William E. Doyle, U.S.D.J., granting a preliminary injunction in *Noyd* v. *McNamara, et al.*, —— F. Supp. —— (D. Colo., Mar. 29, 1967) (not yet reported but printed in the Appendix, p. 48). Judge Doyle subsequently dismissed the complaint in *Noyd* v. *McNamara, et al.*, on jurisdictional grounds, specifically, that petitioner had failed to exhaust his military remedies. 267 F. Supp. 701 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967).

Constitutional Provisions, Statutes and Regulations Involved

United States Constitution,
Article I, Section 9(2):

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

United States Constitution,
Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U. S. C. §2241(a):

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

Uniform Code of Military Justice,
Art. 71(c); 10 U. S. C. §871(c):

"(c) No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

Uniform Code of Military Justice,
Art. 13; 10 U. S. C. §813:

"Subject to section 857 of this title (article 57), no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."

Uniform Code of Military Justice,
Art. 57(b); 10 U. S. C. §857(b):

"(b) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement."

Manual for Courts-Martial, United States, 1968,
¶18b(3):

"(3) Other than restraint administered as prescribed in this subparagraph (18*b*(3)), forfeiture of pay or

allowances due on and after the date of approval of certain sentences, and minor punishments for infractions of discipline while confined, no punishment may be imposed upon an accused as a result of trial by court-martial until the sentence has been approved and ordered executed. No person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest, restriction, or confinement upon the charges pending against him, nor shall the arrest, restriction, or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline (Art. 13). Minor punishment shall include all punishment authorized by regulations of the Secretary of a Department for violation of the discipline prescribed for the place in which an accused is confined. See 68*g* regarding the effect of punishments for minor offenses upon subsequent court-martial proceedings. Prisoners being held for trial or whose sentences have not been approved and ordered executed will be accorded the facilities, accommodations, treatment, and training prescribed in pertinent regulations."

Manual for Courts-Martial, United States, 1968, ¶21d:

"d. *Responsibility for restraint after trial.* Upon notification from a trial counsel of the result of a trial (44*e*), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. This action, depending on the circumstances, may involve the immediate release of the per-

son from any restraint, or the imposition of any necessary restraint, pending final action on the case. See 20*d*(1)."

Manual for Courts-Martial, United States, 1968, ¶97c:

"c. *Interruptions of execution of a sentence.* A sentence to confinement, hard labor without confinement, restriction to limits, or deprivation of privileges is continuous until the term expires, with certain exceptions. These exceptions include the following:

"When delivery under Article 14 is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of his sentence (Art. 14(b)).

"When a prisoner serving a court-martial sentence to confinement is later convicted by a court-martial of another offense for which he is sentenced to confinement, the subsequent sentence interrupts the running of the prior sentence will be served after the subsequent sentence has been fully executed.

"Periods during which the person undergoing such a sentence is absent without authority, or is absent under a parole which proper authority has later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon his peti-

tion for a writ of habeas corpus under a court order which is later reversed by a competent tribunal shall be excluded in computing the service of the term of the punishment.

"Periods during which a sentence to confinement is suspended shall be excluded in computing the service of the term of confinement (Art. 57(b))."

Questions Presented

1. Where a military prisoner is ordered into confinement to commence serving a court-martial sentence, in apparent violation of a provision of the Uniform Code of Military Justice which forbids execution of such sentence until after the completion of military appellate review, is a Federal court deprived of habeas corpus jurisdiction by the doctrine of exhaustion of military remedies?

2. May a military prisoner be ordered into confinement to commence serving a court-martial sentence of one year's confinement prior to the completion of military appellate review in the face of Article 71(c) of the UCMJ which forbids execution of such sentence until after the completion of military review?

3. Petitioner is an Air Force officer who became a conscientious objector after 11 years of honorable service, and whose application for classification as a conscientious objector and either separation or reassignment to duties not conflicting with his conscience, was denied by the Secretary of the Air Force. Judicial review of the denial of his application was declined by the United States District Court for the District of Colorado and by the Tenth Circuit on the

grounds of exhaustion of military remedies, such courts holding that wrongful denial could be raised as a defense to any ensuing court-martial for disobedience of an order. This Court denied certiorari. At the ensuing general court-martial, petitioner was convicted of disobedience and sentenced to dismissal, total forfeiture of all pay and allowances, and confinement for one year. In such court-martial proceeding and in the review thereof by an Air Force Board of Review, jurisdiction to consider petitioner's defense based on wrongful denial of conscientious objection was again declined, the Board of Review holding that only the Federal courts had jurisdiction to remedy erroneous administrative action by the Secretary of the Air Force. Although UCMJ, Article 71(c) forbids execution of any sentence involving confinement of one year or more prior to the completion of military appellate review, petitioner was ordered into confinement by respondents "pending completion of appellate review."

(a) Under these circumstances, has petitioner been deprived of his liberty without due process of law in that he has been tried, convicted, sentenced, and ordered into confinement before there has been any hearing on the merits of his case?

(b) Is the Tenth Circuit's reversal of the District Court's partial grant of habeas corpus, again on grounds of exhaustion of military remedies, an unconstitutional suspension of the writ of habeas corpus?

Statement of the Case

Petitioner, a Captain in the United States Air Force, was convicted on March 8, 1968 by a General Court-Martial at Cannon Air Force Base, Clovis, New Mexico, of violating Article 90 of the Uniform Code of Military Justice. Article 90 proscribes the willful disobedience of a lawful order. The order which Captain Noyd, a former fighter pilot, was accused of disobeying was that he fly an instructional mission with a student pilot in order to train him for combat duty in Vietnam.

Petitioner's principal defense was that, prior to the order in question, he had made application for separation or reassignment as a conscientious objector, that such application had been wrongfully denied by the Secretary of the Air Force pursuant to an error of law, and that such error of law tainted the subsequent order to train the student pilot and rendered it illegal. The essential error of law made by the Secretary, and the underlying substantive question in all of the Noyd litigation[2] is that Captain Noyd was deemed disqualified from classification as a conscientious objector because he was a "selective" conscientious objector, a discriminating pacifist rather than a universal pacifist.

On March 9, 1968, he was sentenced by the general court-martial to dismissal from the service, forfeiture of all pay

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[2] The first case was the unsuccessful effort to secure pre-court martial judicial review of the denial of his application, *Noyd* v. *McNamara*, 267 F. Supp. 707 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967). Next came the court-martial proceedings, *U. S.* v. *Noyd*, ACM 20121, —— CMR ——. See App., p. 35. This case, *Noyd* v. *Bond*, *supra*, was instituted in an effort to prevent the unlawful execution of Capt. Noyd's sentence of one year's confinement prior to completion of military appellate review.

and allowances, and one year's confinement. Immediately following his sentence, petitioner was ordered confined to his quarters pending appeal by order of respondent Colonel Doerr, the Base Commander of Cannon Air Force Base. On May 10, 1968, the General Court-Martial convening authority, the respondent General Bond, approved the conviction and sentence and ordered petitioner confined at the United States Disciplinary Barracks, Fort Leavenworth, Kansas "pending completion of appellate review." [Headquarters, Twelfth Air Force (TAC) General Court-Martial Order No. 13 dated 10 May 1968 (hereinafter "GCMO13").] GCMO13 is printed at App., p. 30.

Pursuant to military law, petitioner was entitled to appellate review of his conviction by an Air Force Board of Review and further review, on petition for grant of review, by the United States Court of Military Appeals. 10 U. S. C. §§866, 867. On September 3, 1968, an Air Force Board of Review upheld petitioner's conviction, ruling that it lacked jurisdiction to review whether the Secretary had acted unlawfully. *United States* v. *Noyd,* ACM 20121, —— CMR ——. The opinion of the Air Force Board of Review has not yet been reported. It is printed in the App., p. 35. Captain Noyd's petition for grant of review to the Court of Military Appeals was granted on January 23, 1969.

The only judge thus far to rule on the merits of Captain Noyd's defenses was sufficiently moved to issue a preliminary injunction restraining the Air Force from placing Captain Noyd in a position where he would be compelled to disobey an order in violation of his conscientious beliefs. *Noyd* v. *McNamara,* —— F. Supp. —— (D. Colo., Mar. 29, 1967) *per* Judge Doyle. This decision by Judge Doyle has not yet been reported. It is printed in the App.,

p. 48. Judge Doyle subsequently invoked the doctrine of exhaustion of military remedies and ruled that the merits of Captain Noyd's legal defenses must be passed upon by the military courts prior to consideration by the Federal District Court. *Noyd* v. *McNamara,* 267 F. Supp. 701 (D. Colo. 1967), aff'd 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967). Unfortunately, the military courts have, thus far, declined to pass upon those defenses. See App., pp. 40-41.

Nevertheless, Captain Noyd was in physical confinement from March 9, 1968, pending military appellate review of his conviction, until December 24, 1968, when he was released from incarceration pursuant to order of Mr. Justice Douglas, 89 S. Ct. 478, App., p. 27. The conditions of Captain Noyd's confinement at Cannon Air Force Base are set forth at App., p. 32.

Not content with Captain Noyd's confinement at Cannon Air Force Base, the respondent General Bond, ordered Captain Noyd confined to the United States Disciplinary Barracks at Fort Leavenworth, Kansas pending the results of his appeal (GCMO13). The order of confinement to Leavenworth led to the filing of a petition for a writ of habeas corpus in the United States District Court for the District of New Mexico. Only the order of the Federal District Court, entered on May 24, 1968, prevented the execution of the Leavenworth confinement order.[3]

Chief Judge Payne, in his decision in the District Court, recognized that any attempt to jail Captain Noyd prior to

[3] Although the Tenth Circuit reversed the District Court, thereby freeing respondents from the restraint imposed by the District Court's order, and thereby permitting the Leavenworth confinement order to be executed, the Tenth Circuit subsequently, on December 6, 1968, granted a stay of its mandate pending certiorari.

the completion of military appellate review would constitute a clear violation of Article 71(c) of the Uniform Code of Military Justice, since Article 71(c) forbids execution of a sentence which includes confinement of one year or more, prior to the completion of appellate review. Accordingly, he invalidated the attempt to incarcerate Captain Noyd at Fort Leavenworth pending the completion of appellate review, 285 F. Supp. 785. See App., p. 16.

Both sides appealed Judge Payne's decision to the Court of Appeals. Petitioner appealed from so much of Judge Payne's decision as declined to order his complete release from confinement pending completion of military appeals. Respondents appealed from so much of the decision of the District Court as partially granted the writ.

The Court of Appeals ruled below, however, that the District Court lacked the power to relieve petitioner from premature confinement at Leavenworth pending appeal because petitioner had "failed to exhaust his military remedies." The District Court was reversed. 402 F. 2d 441, 443, App., p. 22.

Simultaneously with the filing of a petition for certiorari, petitioner's counsel made application to Mr. Justice White, in his capacity as Circuit Justice, for release from confinement pending certiorari.[4] Mr. Justice White denied the application on December 18, 1968.

With time credited for good behavior, Captain Noyd's sentence of one year's confinement, which had commenced

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[4] In accordance with Rules 27, 50 and 51 of this Court, before making such application to the Circuit Justice, petitioner's counsel made a similar application to the Tenth Circuit. The Tenth Circuit denied the application for release from confinement pending certiorari on December 6, 1968.

running on March 9, 1968, was due to expire on December 26, 1968. See Departments of the Army and the Air Force, AR 633-30, AF 125-30, "Military Sentences to Confinement" (Nov. 1964). Petitioner's concern that mootness problems might arise if the running of the sentence were not interrupted was expressed in the application.

Petitioner's counsel subsequently made application to Mr. Justice Douglas for release from confinement pending certiorari. On December 24, 1968, Mr. Justice Douglas granted the relief set forth in his opinion, 89 S. Ct. 478, App., p. 27, commenting specifically, that two substantial questions were raised: (1) whether the doctrine of exhaustion of military remedies applies where the question at issue is whether the court-martial convening authority acted beyond jurisdiction; and (2) the respective scope of review of the Court of Military Appeals and the Federal courts on military habeas corpus applications of this nature.

Noting that the application had been made to him during recess, and that the Court would not reconvene until January 10, 1969, Mr. Justice Douglas directed that petitioner be placed "in a non-incarcerated status," and otherwise protected, until the entire Court could consider the petition for certiorari, 89 S. Ct. at 479.

In response to the petition for certiorari, and Mr. Justice Douglas' release order, the Government filed a "Memorandum for the Respondents Suggesting Mootness." This memorandum took the position that the matter was moot, notwithstanding the order of Mr. Justice Douglas, since pursuant to Article 57(b) of the UCMJ, 10 U. S. C. §857(b), petitioner's confinement, which commenced to run on the date it was adjudged, could not be interrupted "un-

less the sentence is 'suspended'." (Memo, pp. 3-4, fn. 2.) Petitioner filed a reply memorandum in opposition to respondents' memorandum suggesting mootness, citing paragraph 97c of the Manual for Courts-Martial, *supra*, p. 6, two decisions of the Court of Military Appeals, as well as the legislative history of UCMJ 57(b), all of which indicate that "probationary suspension" of a sentence is not the only occasion when the running of a sentence is interrupted.

The Government then submitted a "Supplemental Memorandum for the Respondents." On January 20, 1969, the petition for a writ of certiorari was granted. The order granting certiorari stated further that the stay theretofore granted by Mr. Justice Douglas "shall remain in effect pending the issuance of the judgment of this Court or until further order of this Court." 89 S. Ct. 692, App., p. 29.

Following Judge Payne's decision, on June 6, 1968, the respondent Doerr ordered petitioner moved from his family quarters, to which he had previously been confined, to a room in a bachelor officers' quarters. The conditions of his incarceration remained substantially the same until petitioner was ordered released by Mr. Justice Douglas on December 24, 1968. They included absolute restriction to his room except for authorized exits, at specific hours, in each case with prior notification to Security Police, to obtain meals and to take care of personal needs; restriction of exercise to one weekly period of 1½ hours; restriction of visiting by his wife and two infant children to two weekly visits of two hours each; all non-family visiting restricted to one

weekly one-hour period; a large sign affixed to his door which read "Off Limits to Military Personnel." App., p. 32.

Pursuant to Mr. Justice Douglas' order, petitioner was released from confinement on December 24, 1968 and restored to duty. He is presently assigned as Special Assistant to the Wing Commander of the 27th Tactical Fighter Wing at Cannon Air Force Base, New Mexico. Pursuant to the protective provision included in Mr. Justice Douglas' order, and continued by the order of this Court, prior to receiving his various assignments, petitioner was asked if these assignments were of a nature which would interfere with his conscientious beliefs and thereby perhaps subject him to another court-martial or other proceedings that might injure him. In response thereto petitioner assured his superiors that the various administrative and personnel duties assigned to him were in no way in conflict with his beliefs and he has proceeded to perform these duties.

Summary of Argument

I. The Court of Appeals Improperly Denied Relief on the Grounds of Failure to Exhaust Military Remedies.

The doctrine of "exhaustion of military remedies", insofar as it retains any validity at all, applies only to attempts to secure review of errors allegedly committed by a court martial. *Gusik* v. *Schilder*, 340 U. S. 128 (1950). It has no application to an attack upon the bare legality of military confinement—unconnected with any attack upon the underlying court-martial proceeding.

(a) Questionable applicability of exhaustion doctrine.

(1) "Jurisdiction" and the Exhaustion of Military Remedies.

When the jurisdiction of the military to impose restraints is questioned, a petitioner need not exhaust his military remedies prior to seeking relief in the Federal Courts. *U. S. ex rel. Guagliardo* v. *McElroy,* 158 F. Supp. 171 (D. D. C. 1958), 259 F. 2d 927 (D. C. Cir. 1968), aff'd 361 U. S. 281 (1960); *Reid* v. *Covert,* 354 U. S. 1 (1957); *U. S. ex rel. Toth* v. *Quarles,* 350 U. S. 11 (1955); *Gallagher* v. *Quinn,* 363 F. 2d 301 (D. C. Cir. 1966), cert. den. 385 U. S. 881 (1966). Since Captain Noyd contended that the Uniform Code of Military Justice totally removed the military's jurisdiction to jail him pending appeal, he was under no obligation to exhaust his military remedies prior to seeking relief in a Federal Court. *Oestereich* v. *Selective Service System Local Board No. 11,* 89 S. Ct. 414 (1968).

(2) Exhaustion of remedies generally.

Courts have refrained from invoking the "exhaustion" doctrine:

(a) where the imposer of sanctions acted plainly beyond its jurisdiction or contrary to law. *Oestereich* v. *Selective Service System Local Board No. 11, supra; McCullouch* v. *Sociedad Nacional,* 372 U. S. 10 (1963); *Leedom* v. *Kyne,* 358 U. S. 184 (1958).

(b) where the administrative remedies are inadequate. *NLRB* v. *Marine Workers,* 391 U. S. 418 (1968); *Damico* v. *California,* 389 U. S. 416 (1967).

(c) where the delay inherent in exhaustion would cause irreparable injury. Jaffe, *Judicial Control of Administrative Action* 429 (1965).

(d) where the attempted exhaustion would prove a futility. *Levers* v. *Anderson,* 326 U. S. 219 (1945); *Hammond* v. *Lenfest,* 398 F. 2d 705 (2nd Cir. 1968).

Since respondents acted plainly beyond their statutory power, in violation of a right provided by Congress, there is no requirement of exhaustion. *Oestereich* v. *Selective Service System Local Board No. 11, supra.*

(b) Inadequacy and ineffectiveness of suggested military remedies.

(1) Inadequacy of normal appellate process

Because of the unique nature of right to minimal restraint pending appeal, it cannot be urged via the normal appellate channels, without destroying it.

(2) Inadequacy of extraordinary writ application to Court of Military Appeals.

A number of very serious practical difficulties would be created if all military habeas corpus petitions were initially funnelled through the Court of Military Appeals:

(a) an extraordinary strain would be placed upon the Court, inhibiting its ability to fulfill its primary role as an appellate tribunal.

(b) extraordinary practical difficulties would be encountered in transporting petitioners and witnesses to Washington, D. C. to take part in habeas corpus hearings. *Johnson* v. *Eisentrager,* 339 U. S. 763 (1950).

(c) great difficulty would be encountered in retaining civilian counsel to prosecute a habeas corpus peti-

tion in Washington, D. C. on behalf of military prisoners in custody in distant military installations.

(3) Hesitant quality of Court of Military Appeals' practice on extraordinary writ applications.

It is scarcely two years since the Court of Military Appeals ruled that it possessed habeas corpus jurisdiction. To date, however, no extraordinary writ has been issued by the Court. Although habeas practice may develop in the future, the inherent limitations in the process of jurisdictional evolution render the present status of habeas practice in the Court of Military Appeals ineffective to provide adequate, effective and practical relief.

(4) No bar exists, by way of comity or otherwise, to concurrent habeas corpus jurisdiction.

Habeas corpus jurisdiction over military personnel may exist concurrently between the Court of Military Appeals and the Federal courts. Since only one sovereignty is involved—the United States of America—no principle of comity bars concurrent jurisdiction. *Fay* v. *Noia*, 372 U. S. 391 (1963).

(c) Conflict between the circuits.

This Court should reject the narrow jurisdictional position of the 10th Circuit below and adopt the practical jurisdictional position enunciated by the Second Circuit in *Hammond* v. *Lenfest, supra* and by the Fifth Circuit in *In re Kelly*, —— F. 2d ——, 37 U. S. L. W. 2165 (5th Cir. 1968).

II. General Court Martial Order #13 Ordering Captain Noyd Confined to the United States Disciplinary Barracks at Forth Leavenworth "Pending Completion of Appellate Review" Violated the Uniform Code of Military Justice.

If it is possible for a commanding officer to effect the *de facto* execution of a one year prison sentence prior to the completion of the military appellate process, the integrity of that process is seriously compromised.

A. Development of the Military Appellate Process

During the past 40 years, appellate jurisdiction has passed from a field officer to a three judge civilian court.

As long as there has been an American military establishment, it has provided that court martial sentences, especially those involving heavy penalties, may not be carried into execution until the appropriate appellate procedures have been completed.

B. Article 71(c) and Its Consistent Interpretation

Whenever the issue has arisen, military courts have condemned the "execution" of a sentence to confinement of one year or more prior to the completion of appellate review as a violation of Article 71(c) of the Uniform Code of Military Justice. *U. S.* v. *Smith,* 2 CMR 817 (1952); *U. S.* v. *Ranes,* 3 CMR 550 (1952); *U. S.* v. *Lucero,* 8 CMR 942 (1955).

C. The Meaning of "Execution" Under Federal Law

"Execution" of a sentence to confinement occurs upon the initiation of penal incarceration. *Sweet* v. *Taylor,* 178 F. Supp. 456 (D. Kans. 1959); *United States* v. *Murray,*

275 U. S. 347 (1928); *United States* v. *Affronti*, 350 U. S. 79 (1955). Confinement at Forth Leavenworth is clearly "penal incarceration".

III. The Confinement of Captain Noyd at Cannon Air Force Base "Pending Appeal" Violated the Uniform Code of Military Justice.

Military law provides that post conviction military personnel may not be subjected to any restraint pending appeal more vigorous than is necessary to insure their physical presence. Article 13 UCMJ, 10 U. S. C. 813; ¶18b(3) MCM.

Any restraint more vigorous is, by definition, punitive and constitutes the premature execution of a sentence to confinement. Article 71(c) UCMJ, 10 U. S. C. 871(c).

Since no one has ever intimated the slightest fear that Captain Noyd would refuse to obey the mandate of an appellate tribunal, his confinement at Cannon Air Force Base could not be labelled as anything other than punitive. As such, it was illegal.

IV. The Continued Incarceration Imposed Upon Captain Noyd Pending Completion of the Military Appellate Process Deprived Him of His Liberty Without Due Process of Law Since No Tribunal—Civilian or Military—Has Accepted the Responsibility of Passing Upon the Merits of His Defense.

In *Noyd* v. *McNamara*, 373 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967), the 10th Circuit directed Captain Noyd to present his defenses to a court martial before seeking relief in a Federal court.

In *U. S.* v. *Noyd*, —— CMR ——, ACM 20121, see App. p. 35, Captain Noyd's court martial disclaimed jurisdiction over his defenses and directed him to the Federal court.

Despite the failure of either the 10th Circuit or the military court to pass on the merits of his defense, Captain Noyd was imprisoned pending appeal.

In *Noyd* v. *Bond*, 402 F. 2d 441 (10th Cir. 1968), the 10th Circuit refused to order Captain Noyd freed pending appeal.

The cumulative effect of the reciprocal solicitude which the 10th Circuit and the Military courts have entertained for each others' jurisdictional purity has been the unconstitutional incarceration of Captain Noyd for over nine months without ever having afforded him a hearing on his defense.

V. This Case Is Not Moot.

Captain Noyd's sentence to confinement has not expired because it was tolled by Mr. Justice Douglas' order releasing him from confinement on December 24, 1968. This Court has inherent power to toll the running of a sentence in aid of its jurisdiction. *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947). Under military law, a sentence to confinement is tolled when a military prisoner is free of restraint. ¶97c MCM; *United States* v. *Bryant*, 30 CMR 133 (1961).

Even if Captain Noyd's sentence had expired, the "continuing circumstances" doctrine would prevent this appeal from becoming moot. *Bus Employees* v. *Missouri*, 374 U. S. 74 (1963).

POINT I

The Court of Appeals improperly denied relief on the grounds of failure to exhaust military remedies, although such doctrine, of dubious validity in any event, has no application where the military authority acts outside its jurisdiction. Exhaustion is likewise not required since the asserted military remedies in this case would be inadequate, ineffective and impractical. The Court of Appeals' constricted jurisdictional holding is in conflict with decisions of other Courts of Appeals.

The Court of Appeals did not rule on the merits of petitioner's claim that he was ordered incarcerated in violation of military law.[5] Citing one Supreme Court decision, *Gusik* v. *Schilder,* 340 U. S. 128 (1950), and a number of its own prior decisions, it declined jurisdiction on the grounds that petitioner had not exhausted all possible military remedies. The Tenth Circuit stated it to be "well established . . . that habeas corpus is not available to review military confinement until after all remedies afforded by the UCMJ have first been exhausted." 402 F. 2d at 442, App., p. 25. But in *Gusik* v. *Schilder, supra,* this Court's declination of jurisdiction on grounds of non-exhaustion was in response to a petition which sought review of various errors in the court-martial proceedings. *Gusik* was not, as is this case, an attack on the lawfulness

[5] However, the citation by the Court of Appeals of three decisions of military Boards of Review, *U. S.* v. *Smith,* 2 CMR 817 (1952); *U. S.* v. *Ranes,* 3 CMR 550 (1952); and *U. S.* v. *Lucero,* 18 CMR 942 (1955), all of which uphold petitioner's contention that such confinement is unlawful, strongly suggests that the Court of Appeals agreed with the District Court on the merits. See discussion of merits in Point II, *infra.*

of the confinement, unconnected with any possible trial errors.

It may indeed be "well established" that habeas corpus is not available to review military *trials* until after exhaustion.[5] However, petitioner respectfully suggests that it is not at all well established that the bare question of military *confinement* itself—uncoupled with a collateral attack on the court-martial proceedings resulting in the confinement—is not amenable to Federal habeas corpus. See *Gallagher* v. *Quinn*, 363 F. 2d 301, 303 (D. C. Cir. 1966), cert. den. 385 U. S. 881 (1966); *Neary* v. *Greenough*, 120 F. Supp. 833, 838 (D. Me. 1954). In any event, this Court has never so held in *Gusik* or in any other decision. Moreover, the decision below that a Federal court is powerless, pre-exhaustion, to redress a blatant violation of Article 71(c) of the UCMJ is a case of "first impression." 89 S. Ct. 478 (per Mr. Justice Douglas).

(a) *Questionable applicability of exhaustion doctrine.*

(1) "Jurisdiction" and the exhaustion of military remedies.

The only justification offered by the Tenth Circuit for its holding is the reinvocation of the doctrine of exhaustion of military remedies. It is questionable, however, if the doctrine is as monolithic and ubiquitous as the Court below suggests. The doctrine as asserted in *Gusik* v. *Schilder*, 340 U. S. 128 (1950)[6] does not appear to have

[6] *Gusik* may very well be explained by the extraordinary conditions of military justice revealed in many of the early post-World War II cases. See *Servicemen in Civilian Courts*, 76 Yale L. J. 380, 383-385 (1966). A great public outcry against large-scale abuses led ultimately to the enactment of the Uniform Code of Military Justice in 1950. But one of the stopgap measures enacted by Congress was an amendment to the Articles of War which gave

been reaffirmed by this Court in the succeeding eighteen years, notwithstanding many opportunities to do so.

The case of *U. S. ex rel. Guagliardo* v. *McElroy,* 158 F. Supp. 171, 173 (D. D. C. 1958), 259 F. 2d 927 (D. C. Cir. 1958), aff'd 361 U. S. 281 (1960) is of particular significance. A civilian employee of the Air Force was charged with a violation of the UCMJ, tried by a general court-martial, found guilty and sentenced. Appellant admittedly did not exhaust the judicial processes available to him under the UCMJ prior to petitioning the United States District Court for the District of Columbia for a writ of habeas corpus. His substantive contention was that inasmuch as he was a civilian the military authorities lacked jurisdiction to try him and that accordingly, his confinement was unlawful.

The threshold question, however, was whether or not the decision of this Court in *Gusik, supra,* compelled a denial of relief because of the failure to exhaust military remedies. The District Court and the Court of Appeals for the District of Columbia both noted that the *Gusik* doctrine was substantially undercut, if not completely overruled by this Court's decisions in *Reid* v. *Covert,* 354 U. S. 1 (1957) and *U. S. ex rel. Toth* v. *Quarles,* 350 U. S. 11 (1955), since in those cases this Court had not raised *Gusik* as a bar to determining lack of military jurisdiction. Accordingly, the District Court held in *Guagliardo*:

> "This court cannot reasonably reach any conclusion other than that the Gusik case has been overruled *sub*

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the Judge Advocate General of each service vast power to order new trials and grant other relief. Faced with this specific recent expression of congressional intent, it is not difficult to understand a judicial reluctance to disregard the new remedy.

silentio by the Toth and Reid cases, insofar as it applies to the necessity of exhausting other available remedies in a case in which the jurisdiction of a court martial is challenged on constitutional grounds. Consequently the objection that the petitioner has failed to exhaust all of his remedies within the military system is overruled." 158 F. Supp. at 173.

The Court of Appeals for the District of Columbia affirmed, holding:

"Appellees contend that the jurisdictional question is prematurely raised because appellant has not exhausted the judicial processes available to him under the Uniform Code of Military Justice. They rely upon Gusik v. Schilder, 340 U. S. 128, 71 S. Ct. 149, 95 L. Ed. 146. But that case we think is inapposite, for there court-martial jurisdiction over the accused unquestionably existed since he was a member of the United States Army. He sought to attack collaterally a court-martial judgment because of alleged errors in the court-martial proceedings, without exhausting the administrative remedies available for their correction. Here, in contrast, the question is whether appellant is subject to court-martial jurisdiction at all. Habeas corpus proceedings were used to determine such a question in Reid v. Covert, 354 U. S. 1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148, and United States ex rel. Toth v. Quarles, 350 U. S. 11, 76 S. Ct. 1, 100 L. Ed. 8. The point was not discussed, but in view of Gusik v. Schilder, supra, could not have been overlooked by the Supreme Court, especially as the Court in Reid v. Covert specifically noted that the petition was brought 'while Mrs. Covert

> was being held * * * pending a proposed retrial by court-martial * * *.' 354 U. S. at page 4, 77 S. Ct. at page 1124, 1 L. Ed. 2d 148. If appellees have no court-martial jurisdiction whatever over appellant the great Writ is available to release him from their custody." 259 F. 2d at 928-929.

This Court affirmed without any mention of exhaustion as a problem. 361 U. S. 281 (1960).

Other decisions of Federal Courts, both pre- and post-*Guagliardo,* are in accord with the doctrine that the rule of exhaustion of military remedies does not apply where military jurisdiction is attacked. Perhaps the strongest case is *Gallagher* v. *Quinn,* 363 F. 2d 301 (D. C. Cir. 1966), cert. den. 385 U. S. 881 (1966). In this action in the District Court for the District of Columbia, appellant sought a Federal Court order directing the Court of Military Appeals to grant review in a case where, pursuant to its discretionary authority, it had not granted review. The court expressly noted that appellant "is not without other though partial remedies within the military establishment." 363 F. 2d at 304. But it affirmed federal jurisdiction, notwithstanding the failure to exhaust, because "appellant does not challenge the trial itself", 363 F. 2d at 303, but only the constitutional validity of the UCMJ provision which denied him review as of right by the Court of Military Appeals.

Appellant's attack in *Gallagher* v. *Quinn* was thus directed at the jurisdiction of the military to hold him in alleged violation of his constitutional right to have review in the Court of Military Appeals. In this case, Captain Noyd's challenge to the jurisdiction of respondents to incarcerate him prior to the completion of his unquestioned

military appellate rights, and prior to any hearing on his principal defense, is so much clearer, *a fortiori.* See Points II-IV, *infra,* for a discussion of respondents' manifest lack of power to confine Captain Noyd pending appeal.

As Chief Judge Yankwich observed, whenever a military prisoner attacks jurisdiction "no question can be raised as to whether he has exhausted his remedies through channels". *In Re Yokoyama,* 170 F. Supp. 467, 468 (S. D. Calif., Cent. Div. 1959). In *Neary* v. *Greenough,* 120 F. Supp. 833 (D. Me. 1954) a marine sought habeas corpus, arguing that he had been previously discharged. The response to the writ alleged failure to exhaust military remedies under *Gusik.* The court pointed out, at p. 838:

> "Neary's habeas corpus application is directed against his detention in the service and not any detention under a court-martial conviction. Gusik v. Schilder . . . and related cases are limited to where the habeas corpus petitioner was attacking the court-martial proceedings without more. . . . Neary is not attacking the court-martial proceedings in this action."

Plainly, Captain Noyd is not attacking the court-martial proceedings in this action; his habeas corpus application is directed against the fact and the timing of his detention and not the proceedings of the court-martial which convicted him and ordered him detained. As Judge Harris observed in *Peck* v. *Carpenter,* 120 F. Supp. 560, 562 (N. D. Calif., S. Div. 1954), likewise rejecting a *Gusik* v. *Schilder* exhaustion claim, compelling the serviceman under such circumstances to use a pending administrative remedy "would result in a *suspension* of the writ of habeas corpus" (emphasis in original).

Obviously petitioner in this case does not seek habeas corpus to attack the many errors which he believes occurred in his court-martial proceedings. See *Neary* v. *Greenough, supra.* He is content to exhaust all his military remedies for the redress of those errors. Habeas corpus is sought so that if these errors are redressed on appeal, he will not have been deprived of this redress by intervening confinement.

(2) Exhaustion of remedies generally.

There is little difference conceptually if the remedy which one is told he must exhaust prior to judicial review is an "administrative" remedy, or a "state court" remedy, or a "military" remedy. The wooden application of the doctrine can often have the effect, as in this case, of rendering a right remediless; the litigant "becomes exhausted instead of the remedies"; *NLRB* v. *Marine Workers,* 391 U. S. 418, 425 (1968).[7]

Indeed, it is now universally recognized that the doctrine that administrative remedies must be exhausted before resorting to the courts is not a rule of constitutional or even of statutory dimension. It came into being simply as a device of judicial policy and convenience adopted by the courts and will not be applied in a hidebound fashion. Since it is a judge-made rule, it will be disregarded by courts whenever there is a good reason to do so. "The requirement of exhaustion is a matter within the sound discretion of the courts." *NLRB* v. *Marine Workers, supra* at 426. See *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300 (1937); *Lockhart* v. *U. S.,* —— F. 2d ——, 37 U. S.

[7] "Exhaustion . . . is not without certain overtones of Kafka." Shapiro, *The Supreme Court and Administrative Agencies* 116 (1967).

Law W. 2269 (9th Cir., Oct. 23, 1968). "The statement that courts so often repeat in their opinions—that judicial relief must be denied until administrative remedies have been exhausted—is seriously at variance with the holdings." 3 Davis, *Administrative Law Treatise*, §20.01, at 56 (1958).[8]

This Court and lower Federal courts have not required exhaustion:

(a) where the agency, tribunal, or other imposer of sanctions acted plainly beyond its jurisdiction or contrary to law, *Oestereich* v. *Selective Service System Local Board No. 11*, 89 S. Ct. 414, 416 (1968); *McCullouch* v. *Sociedad Nacional*, 372 U. S. 10, 16-17 (1963); *Leedom* v. *Kyne*, 358 U. S. 184, 188-189 (1958); *Public Utilities Commission* v. *United Fuel Gas Co.*, 317 U. S. 456, 469 (1943) (. . . the orders . . . are on their face plainly invalid); *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 591 (1926) (" . . . an entire lack of that acute appreciation of justice which should characterize a tribunal. . . . "); *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562 (1919) (contention that "the Commission has exceeded its statutory powers");

(b) where "the administrative remedies are inadequate", *NLRB* v. *Marine Workers*, 391 U. S. 418, 426 (1968); *Damico* v. *California*, 389 U. S. 416 (1967) (reversing dismissal of complaint, on grounds of non-exhaustion, by three-judge court); *McNeese* v. *Board of Education*, 373 U. S. 668, 676 (1963) (state remedy provided only "tenuous" protection); *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) ("The federal remedy is

[8] For a discussion of the "flexibility" of the exhaustion doctrine see Shapiro, *supra*, at 112-116.

supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked."); *Hillsborough* v. *Cromwell*, 326 U. S. 620, 625-626 (1945) ("There is such uncertainty concerning the New Jersey remedy as to make it speculative . . . whether the State affords full protection to the federal rights."); 3 Davis, *supra*, §20.07;

(c) where the delay inherent in exhaustion would cause irreparable injury, *Smith* v. *Illinois Bell Telephone Co., supra;* Jaffe, *Judicial Control of Administrative Action* 429 (1965) ("Irreparable injury in its strictest sense is the probable loss, if exhaustion is required, of the value . . . of an asserted right or defense."); and

(d) where attempted exhaustion would be a futility, *Levers* v. *Anderson*, 326 U. S. 219, 223-224 (1945); *Hammond* v. *Lenfest*, 398 F. 2d 705, 713 (2d Cir. 1968); *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (2d Cir. 1967); *School Board of Charlottesville* v. *Allen*, 240 F. 2d 59, 63-64 (4th Cir. 1956); Jaffe, *supra*, at 449.

As shall be demonstrated, *infra*, in this case the purportedly unexhausted remedies would be totally inadequate, dilatory, and futile. But even if these factors were not present, since the respondent convening authority acted plainly beyond his jurisdiction and in clear violation of a statutory right provided by Congress, there is no requirement of exhaustion in any case. "The case we decide today involves a clear departure . . . from . . . statutory mandate." *Oestereich* v. *Selective Service System Local Board No. 11*, 89 S. Ct. 414, 416 (1968).

(b) *Inadequacy and ineffectiveness of suggested military remedies.*

The possible military remedies which the Court below noted included review by an Air Force Board of Review;[9] further review, upon grant of petition therefor, by the Court of Military Appeals;[10] and application for an extraordinary writ to the Court of Military Appeals. None of these suggested remedies can provide the adequate, effective and practical relief which is available through Federal habeas corpus.

(1) Inadequacy of normal appellate process.

In the Board of Review decisions cited by the Court below, relief was indeed granted, but only after varying periods of unlawful incarceration while awaiting decision. In *U. S.* v. *Smith,* 2 CMR 817 (1952), the intervening period was 5½ months; in *U. S.* v. *Ranes,* 3 CMR 550 (1952), it was 2½ months; in this case, had the Board of Review reversed, it would have meant that petitioner would have nonetheless been illegally confined from March 9, 1968 to September 3, 1968, almost six months of a one-year sentence.

Federal habeas corpus relief, on the other hand, can be and in this case was, instantaneous and effective. GCMO 13, the Leavenworth confinement order, was issued May

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[9] The observation of the Court below that the Board of Review had heard oral argument but not yet rendered its decision is inaccurate. Oral argument before the Board of Review was on August 22, 1968; its decision was handed down on September 3, 1968. Argument before the Court below was on October 2, 1968, and its decision was filed on October 30, 1968.

[10] The Court of Military Appeals granted review on two of the four questions presented.

10, 1968. Petitioner promptly obtained a show cause order from the District Court, which contained a stay. Briefs were presented, the matter was heard, and the Court rendered its decision on May 24, 1968, fourteen days after the Leavenworth confinement order was issued.

The length of the record, the complexity of the issues, and the technical problems of preparing for a full appellate review on the merits are all factors which will bear on the length of illegal incarceration, if this were to be the only remedy. Utilization of this remedy would tend to pressure counsel for an unlawfully incarcerated accused to press for speedy review on the question of confinement and not take the time to adequately review, research and prepare for the other questions.

For obvious reasons, awaiting review on the merits by the Court of Military Appeals could not possibly produce relief, in most cases, until approximately a year after conviction.[11]

The inherent delay in the normal military appellate process is vividly demonstrated by the recurring phenomena of the Court of Military Appeals reversing a court-martial conviction, and then, noting that the total confinement has already been served, stating that a new trial would be pointless. See, e.g., *United States* v. *McLaughlin,* 18 USCMA 61, 39 CMR 61 (1968); *United States* v. *Rowe,* 18 USCMA 54, 39 CMR 54 (1968) (6 months' confinement); *United States* v. *Sheeks,* 16 USCMA 430, 37 CMR 50 (1968)

[11] The court-martial record of the five-day trial in this case consists of 402 pages, plus several hundred unnumbered pages of exhibits. Petitioner filed his petition for grant of review on November 22, 1968. Review was granted on January 23, 1969. It is unlikely that the case will be set for oral argument prior to May 1969.

(2 years' confinement reduced by convening authority to one year, and by Board of Review to nine months). See generally any volume of reported decisions of Court of Military Appeals, *passim*.

(2) Inadequacy of extraordinary writ application to Court of Military Appeals.

The third suggested military remedy is the application for an extraordinary writ to the Court of Military Appeals in the light of its holding in *Levy* v. *Resor*, 17 USCMA 135, 37 CMR 399 (1967), and other cases,[12] that it has jurisdiction to hear such writs. But the Court below, we respectfully contend, overlooked a number of serious practical difficulties which would be created by establishing the Court of Military Appeals as the exclusive forum within which a military prisoner may challenge the lawfulness of his detention pending appeal:

(1) A jurisdictional requirement which funnels virtually all military habeas corpus applications through the Court of Military Appeals would place an extraordinary strain upon the facilities of that Court. The Court of Military Appeals is a three judge appellate tribunal. It lacks both the facilities and the manpower to accommodate the vast increase in evidentiary hearings which such a jurisdictional rule would entail. At the present time, the Court is obliged by the pressure of cases to regulate its appellate caseload by the judicious use of its discretionary power to grant review "upon petition of the accused and on good cause shown" UCMJ, Art. 67(b)(3); 10 U. S. C. §867(b)(3). To the extent that the Court is burdened as the exclusive forum

[12] See *United States* v. *Bevilacqua*, 18 USCMA 10, 39 CMR 10 (1968); *Gale* v. *United States*, 17 USCMA 40, 37 CMR 304 (1967); *United States* v. *Frischholz*, 16 USCMA 150, 36 CMR 306 (1966).

from which all military habeas corpus petitions must be launched, it will be correspondingly less able to fulfill its primary role of appellate tribunal.[13]

(2) The very nature of a *habeas corpus* writ requires the presence of the petitioner at his hearing. However, it would be extremely impracticable for military authorities to transport prisoners great distances to Washington, D. C. to appear before the Court of Military Appeals. Cf. *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950):

> "A basic consideration in habeas corpus practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by Congress; indeed, it is inherent in the very term 'habeas corpus'. And though production of the pris-

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[13] During the fiscal year 1967, 794 cases were presented to the Court of Military Appeals for review. Of that number, 30 were forwarded on certificates of a Judge Advocate General. Of the remaining 764 cases, the Court granted review in 102 cases. *Annual Report of the U. S. Court of Military Appeals, and the Judge Advocates General . . . etc. . . . For the period July 1, 1967 to December 31, 1967*, p. 5. Thus, the Court of Military Appeals was able to review only 13% of the cases presented to it. If it were burdened, in addition to its appellate caseload, with the inevitable avalanche of habeas corpus cases which would result from a determination that all military habeas petitions must originate in the Court of Military Appeals, its primary appellate function would be seriously undercut.

During the 1967 Term, this Court disposed of 2946 cases. Of that number, 455 were disposed of on the merits and the remainder were disposed of by the denial or dismissal of a petition for certiorari. The Supreme Court, 1967, 82 Harv. L. Rev. 303 (Table 1). Therefore, this Court was able to review approximately 15% of the cases presented to it. If, suddenly, this Court were burdened with a spate of cases requiring it to hold evidentiary hearings, in addition to its appellate caseload, it would, of course, be severely taxed beyond its physical capability. Yet that is precisely the impact which a decision requiring all military habeas corpus petitions to originate in the Court of Military Appeals would have upon that court.

oner may be dispensed with where it appears on the face of the application that no cause for granting the writ exists [citing cases] we have consistently adhered to and recognized the general rule." 339 U. S. at 778.[14]

(3) It will be virtually impossible for military prisoners to secure civilian counsel to initiate a writ in the Court of Military Appeals. It would be prohibitively expensive for a military prisoner detained in New Mexico or Hawaii, for example, to secure civilian counsel willing to travel to Washington, D. C. in order to initiate a habeas corpus proceeding.

(4) The Court of Military Appeals does not sit during the summer months. The very fact that the Court of Military Appeals recesses for the summer indicates that it does not view itself as the exclusive forum within which to initiate a habeas corpus writ challenging the legality of military detention.

(3) Hesitant quality of Court of Military Appeals practice on extraordinary writ application.

Moreover, even if these practical obstacles did not exist, there would be a serious question as to whether the Court of Military Appeals could be expected to grant habeas

[14] Even under motions pursuant to 28 U. S. C. §2255, in lieu of habeas corpus, this has ruled that a defendant's presence at a §2255 hearing is required whenever an issue of fact is to be determined. *United States* v. *Hayman*, 342 U. S. 205 (1952). In *Hayman*, this Court noted that a major purpose underlying the enactment of §2255 was to alleviate the congestion caused by the prior practice of requiring post-conviction applications to be heard in the district of confinement by effecting a decentralization of habeas corpus applications. Requiring all military habeas corpus applications to be centrally heard by the Court of Military Appeals would create the same kind of evil which Congress sought to remedy via §2255.

corpus relief with the same "solicitude for the vigor of the Great Writ," *Johnson* v. *Avery*, 37 U. S. Law W. 4128, 4129 (Feb. 24, 1969), as is regularly demonstrated by Federal courts.

The Court of Military Appeals has asserted that it can exercise habeas corpus jurisdiction,[15] and this Court has noted such assertion, see *United States* v. *Augenblick*, 89 S. Ct. 528, 531 (1969). But the history of the Court of Military Appeals' performance on applications for a habeas corpus writ does not yet show a single instance of the writ being sustained.[16] It is one thing to assert that "an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the Federal judiciary"; *United States* v. *Bevilacqua*, 18 USCMA 10, 12, 39 CMR 10, 12 (1968);[17] see *United States* v. *Augenblick, supra.* It is another thing to actually demonstrate that it is disposed to grant the relief. Saying so doesn't make it so.[18]

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[15] See *Levy* v. *Resor, supra,* and cases cited in fn. 12 *supra.*

[16] *Ibid.*

[17] In *Bevilacqua,* the Court of Military Appeals, after making this broad assertion, and citing two Federal court decisions which severely criticized military justice, *Application of Stapely,* 246 F. Supp. 316 (D. Utah, 1965), and *Ashe* v. *McNamara,* 355 F. 2d 277 (1st Cir. 1965), proceeded to deny relief.

After the decision of the Court below, counsel for Dr. (Captain) Howard Levy filed a petition for a writ of habeas corpus with the Court of Military Appeals challenging the legality of Dr. Levy's incarceration at Fort Leavenworth during the pendency of his military appeal. The petition alleged that such incarceration was a clear violation of Article 71(c). The Court denied the writ five days after the petition was filed without permitting either briefs or oral argument. No opinion was rendered. Dr. Levy's challenge to his incarceration at Fort Leavenworth is currently pending in the Tenth Circuit. See *Levy* v. *Dillon,* #78-68 (pending before Tenth Cir.).

[18] At least two Federal Courts of Appeals have noted the silence of the Court of Military Appeals on the crucial question of whether

Petitioner has no reason to doubt that, in good time, the Court of Military Appeals will, in practice, entertain and grant habeas corpus applications with the same vigor as that exhibited by Federal courts. The Court of Military Appeals has certainly shown that, in the exercise of its regular appellate jurisdiction, it stands ready to guarantee and enforce the constitutional rights of servicemen. See *United States* v. *Tempia,* 37 CMR 249 (1967); cf. Warren, "The Bill of Rights and the Military", 37 N. Y. U. L. Rev. 181, 189 (1962). But the development of a new jurisdictional head is always a slow process. See *Monroe* v. *Pape,* 365 U. S. 167 (1961). It is therefore no criticism of the Court of Military Appeals, but merely a recognition of the inherent limitations in the process of jurisdictional evolution, to contend, as petitioner does, that at this time in history, the Court of Military Appeals is not a tribunal which can provide adequate, effective and practical relief.

(4) No bar, by way of comity or otherwise, to concurrent habeas corpus jurisdiction.

Finally, even if the Court of Military Appeals should eventually fulfill the promise it made in the *Bevilacqua* case, and relieve the frustration caused by its failure to act heretofore, it has never claimed, in *Bevilacqua* or elsewhere, that it should have *exclusive* habeas corpus jurisdiction in cases involving military prisoners. As the Court

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a wrongful denial of conscientious objector classification can be asserted as a defense to a court-martial prosecution for disobedience of an order. *Brown* v. *McNamara,* 387 F. 2d 150, n. 5 (3d Cir. 1967), cert. den. 390 U. S. 1005 (1968); *Hammond* v. *Lenfest,* 398 F. 2d 705, 713 (2d Cir. 1968). In *United States* v. *Noyd,* petitioner's direct appeal from his court-martial conviction, the Court of Military Appeals has indeed granted review, and specified this very question as one on which review was granted. But whether the grant of review will result in a grant of relief is yet to be seen.

of Claims has aptly observed, ". . . the existence of the Court of Military Appeals does not preclude consideration by this court. . . ." *Augenblick* v. *United States,* 377 F. 2d 586, 593 (Ct. Clms. 1967), rev'd on other grounds, 80 S. Ct. 528 (1969).

There is no reason, in law or judicial policy, why habeas corpus jurisdiction over military prisoners cannot exist concurrently in the Court of Military Appeals and the Federal District Courts, just as concurrent jurisdiction has been recognized over state prisoners as between this Court and Federal District Courts. *Fay* v. *Noia,* 372 U. S. 391 (1963).

It may be argued that since, as a matter of comity, Federal District Courts have refrained from exercising habeas corpus jurisdiction until the state appellate processes have been exhausted, a similar notion of comity should apply to military situations.

However, it is well settled that the decision of the Federal courts to refrain from exercising habeas corpus jurisdiction prior to the completion of state appellate remedies is based upon the intrinsic respect which the Federal Government must accord to the sovereignty of the states of the union. In our Federal system, the states are supreme in their proper spheres of action. Therefore, it would be an affront to the federalist concept of mutual sovereignties for the Federal courts to presume to review the act of a sister sovereignty until that sovereignty has fully acted.

In the case of the Court of Military Appeals, however, there is but one sovereignty—the United States of America. Since comity, by definition, is the respect which one sovereign entity entertains for the acts of another, no principle of comity requires a Federal District Court to refrain from

exercising its traditional function as guardian of the liberty of any person unlawfully detained by an arm of the government of the United States. In fact, in *Fay* v. *Noia,* 372 U. S. 391 (1963), this Court ruled that it was not necessary for a state prisoner to unsuccessfully petition this Court for a writ of certiorari to the highest state appellate tribunal prior to seeking habeas corpus relief in a Federal District Court. *Fay* v. *Noia, supra,* is particularly instructive because it illustrates that the existence of one Federal remedy (appeal to the Supreme Court of the United States) does not prevent a Federal District Court from exercising concurrent habeas corpus jurisdiction. Since *Fay* v. *Noia, supra,* held that a parallel Federal remedy in the Supreme Court would not bar concurrent habeas corpus jurisdiction in the Federal District Court, it follows, *a fortiori,* that the existence of a parallel Federal remedy in the Court of Military Appeals cannot bar concurrent habeas corpus jurisdiction in a Federal District Court.[19]

The issue here is not whether the Court of Military Appeals might have had jurisdiction to grant relief in this case. It is rather whether the Federal Court in New Mexico was *denied* jurisdiction. The history of this case, as well as the preceding discussion, amply supports the conclusion of Chief Judge Payne that:

> "; . . the circumstances present here are such as to render the military remedy process ineffective to protect the petitioner's rights." 285 F. Supp. at 788, App., p. 20.

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[19] Another example of parallel Federal remedies is the concurrent jurisdiction which the Tax Court and the Federal District Court possess in the area of Federal taxation. Compare, 28 USC 1346(a) with IRC §7441, et seq. (1954).

(c) *Conflict between the circuits.*

In the light of the marginal residual validity of the exhaustion doctrine, especially in situations where the challenged action is clearly beyond the power of the agency in question, and the plain inadequacy and ineffectiveness of the purported military remedies, it is not surprising that a conflict has developed between the Court below, and other courts of appeals on the question of whether the doctrine of exhaustion precludes Federal habeas corpus for American military personnel.

In *Noyd* v. *McNamara,* 378 F. 2d 538 (10th Cir. 1967), cert. den. 389 U. S. 1022 (1967), and again in *Noyd* v. *Bond,* 402 F. 2d 441, the Court below adopted an extraordinarily restrictive view of the power and duty of the Federal courts in this area. The Tenth Circuit, in *Noyd* v. *McNamara, supra,* declined to rule on the merits of Captain Noyd's substantive defenses prior to his court-martial, and now in *Noyd* v. *Bond,* has prevented a Federal District Court from enjoining petitioner's premature incarceration pending appeal.

In *Hammond* v. *Lenfest,* 398 F. 2d 705 (2d Cir. 1968), however, the Second Circuit adopted a jurisdictional position squarely at variance with that of the Tenth Circuit. In *Hammond* v. *Lenfest, supra,* the Second Circuit ruled that a serviceman was not obliged to submit to a court-martial prior to raising his defense of conscientious objection in a Federal court. In so holding, the majority explicitly rejected the reasoning of the Tenth Circuit in *Noyd* v. *McNamara.* See also, *U. S. ex rel. Mankiewicz* v. *Ray,* 399 F. 2d 900 (2d Cir. 1968).

In *In re Kelly*, —— F. 2d ——, 37 U. S. Law W. 2165 (5th Cir., Aug. 30, 1968), the Fifth Circuit also explicitly rejected the reasoning of the Tenth Circuit in *Noyd* and chose to adopt the reasoning of the Second Circuit in *Hammond*. The Fifth Circuit stated:

> "In Noyd v. McNamara, . . . the Tenth Circuit considered the courts were without jurisdiction to entertain the suit pending exhaustion of military justice procedures. In Hammond v. Lenfest, 36 U. S. Law W. 2765 (2d Cir., June 10, 1968), the Second Circuit, in a 2-1 decision, rejected Noyd and went the other way . . .
>
> "We view the requirement of exhaustion as did the majority in Hammond. . . ."

See also *Powers* v. *Powers*, 400 F. 2d 438 (5th Cir. 1968); *Brown* v. *McNamara*, 387 F. 2d 150, 153, n. 5 (3d Cir. 1967), cert. den. 390 U. S. 1005 (1968); *Crane* v. *Hedrick*, 284 F. Supp. 250 (N. D. Calif. 1968).

Thus, a sharp conflict between the circuits exists as to the nature and extent of the duty of Federal courts to entertain applications for writs of habeas corpus challenging the lawfulness of military detention. In view of the extraordinary importance of the writ of habeas corpus,[20]

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[20] "This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . ." *Johnson* v. *Avery*, 37 U. S. Law W. 4128, 4129 (Feb. 24, 1969). " . . . its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment can-

petitioner respectfully urges that this Court should declare that the Tenth Circuit is wrong, and that the Second, Third and Fifth Circuits are right.[21]

In addition, the restrictive jurisdictional position of the Tenth Circuit ignores a well-established body of case law which upholds Federal habeas corpus jurisdiction to review the propriety of military post-conviction restraint. *Gibbs* v. *Blackwell*, 354 F. 2d 469 (5th Cir. 1965); *Levy* v. *Resor*, —— F. Supp. —— (D. S. C. 1967), aff'd 384 F. 2d 689 (4th Cir. 1967), cert. den. 389 U. S. 1049 (1968); *Levy* v. *Dillon*, —— F. Supp. —— (L-543, D. Kans., July 29, 1968, #78-68, 10th Cir., argued Jan. 21, 1969); see *Green* v. *Schilder*, 162 F. 2d 803 (10th Cir, 1947); *Kelly* v. *Hunter*, 80 F. Supp. 851 (D. Kans. 1948); *Sweet* v. *Taylor*, 178 F. Supp. 456 (D. Kans. 1959). In all of these cases, regardless of the ultimate decision on the merits, Federal courts accepted jurisdiction notwithstanding the absence of total exhaustion of all military remedies.

Finally, the Tenth Circuit's jurisdictional position casts doubt upon the established procedure of submitting to induction and challenging the validity of the induction order by an application for a writ of habeas corpus to the appropriate Federal District Court. See *Witmer* v. *United*

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not be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay* v. *Noia*, 372 U. S. 391, 401-402 (1963).

[21] The Chief Justice has observed that:

> "When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of civilian courts almost inevitably is drawn into question." Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. Rev. 181, 188 (1962).

States, 348 U. S. 375 (1955); *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304 (1946); *Gibson* v. *United States*, 329 U. S. 338, 359 (1946). According to the rationale of the Tenth Circuit, such applications may not be heard in a Federal Court until the applicants have exhausted every conceivable military forum, including court-martial proceedings. See *Noyd* v. *McNamara, supra.* Such a result would be an unconstitutional suspension of the writ of habeas corpus. See *Gusik* v. *Schilder, supra*, 340 U. S. at 132; *Hammond* v. *Lenfest, supra*, 398 F. 2d at 713-714.

POINT II

General Court Martial Order #13 ordering Captain Noyd confined in the United States Disciplinary Barracks at Fort Leavenworth "pending completion of appellate review" violated the Uniform Code of Military Justice.

Article 71(c) of the Uniform Code of Military Justice, 10 U. S. C. §871(c) provides:

> "No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals."

Since Captain Noyd was sentenced to one year's confinement and dismissal from the service, he clearly falls within the protection of Article 71(c). Insofar as the "dismissal" aspects of Captain Noyd's sentence are concerned, the Air Force authorities have fully complied with Article 71 and have made no attempt to execute the dismissal. Un-

fortunately, they have not shown as scrupulous a regard for the impact of Article 71 upon the confinement aspects of his sentence. In disregard of the wording of Article 71(c), appellees confined Captain Noyd at Cannon Air Force Base since March 9, 1968, and, on May 10, 1968, attempted to intensify that incarceration by ordering him imprisoned in the United States Disciplinary Barracks at Fort Leavenworth, Kansas, "pending the completion of appellate review." GCMO #13, App., p. 30. Only the intervention of the Federal District Court for the District of New Mexico, in response to Captain Noyd's petition for a writ of habeas corpus, prevented the incarceration of Captain Noyd in Fort Leavenworth. *Noyd* v. *Bond,* 285 F. Supp. 785 (D. N. Mex. 1968). The propriety and correctness of that Court's act is now at issue before this Court.

Often, when civilian courts become embroiled in military matters, an argument may be advanced that the unique character of the military establishment requires that civilian courts abstain from interference whenever possible. See, *Noyd* v. *Bond,* 402 F. 2d 441, 443, n. 6 (10th Cir. 1968) (App., p. 22). Such an argument is particularly inappropriate in this case because the power of the civilian judiciary has been invoked, not in derogation of military law, but rather in support of the integrity of the military appellate process as provided by the Uniform Code of Military Justice. 10 U. S. C. 800 *et seq.* If it is possible, as was attempted here, for a commanding officer to effect the *de facto* execution of a one year prison sentence prior to the completion of the military appellate process, in direct violation of the Uniform Code of Military Justice, the integrity of that appellate process is seriously compromised, if not destroyed.

A. *Development of the Military Appellate Process*

The adoption of the Uniform Code of Military Justice in 1951 climaxed a 40-year period in the evolution of military justice, during which appellate jurisdiction passed from a commanding officer in the field to an independent, civilian court in Washington, D. C.

Prior to World War I, appellate review of military court martial proceedings was generally confined to the field officer who convened the court. *Articles of War,* 46 (1916); 39 Stat. 650, 657-8.

During the summer of 1917, a group of Negro soldiers were tried at Fort Sam Houston, Texas, on charges arising out of a disturbance on the military base. The field officer who convened the court martial reviewed the daily transcripts of the trial and, after a finding of guilty and a sentence of death, ordered the soldiers executed two days after the court martial ended. Upon subsequent review, the Army's Judge Advocate General found that grave doubt existed concerning the legality of the entire proceeding. The public outcry was enormous. See, e.g. Post, *What Is a Crime,* The Independent and Weekly Review, April 5, 1919, p. 13; *The Injustice of Military Justice,* The Literary Digest, April 12, 1919; *New York World,* January 19, 1919; 57 Cong. Rec. 877-78 (1918); 57 Cong. Rec. 3387-92, 3809, 4502-08 (1919); 57 Cong. Rec. App. 279-281 (1919); 58 Cong. Rec. 3938-40 (1919).

The "Houston Massacre," as the incident came to be known, coupled with a comparable occurrence at Fort Bliss, Texas, involving long prison terms precipitated a torrent of criticism which impelled the War Department to issue General Order #7, providing that after February 1, 1918, all court martials resulting in either death or dishonorable

discharge would be subject to appellate review by a military Board of Review appointed by the Judge Advocate General.

The experience of World War I resulted in general agreement that statutory provision for appellate review of court martial cases was desirable. See generally, Brown, *The Crowder-Ansell Dispute—The Emergence of General Samuel T. Ansell*, 35 Mil. L. Rev. 1 (1967). Consequently, the 1921 re-codification of the Articles of War provided that in cases involving a general officer, dismissal, death, or sentence to a penitentiary the court martial record was to be reviewed by a Board of Review appointed by the Judge Advocate General. *Articles of War* 50½ (1921); 41 Stat. 787, 797; 10 USC 1472-1593 (1946).

Early in 1948, responding to widespread criticism of the operation of the military appellate system during the Second World War, Congress established a Judicial Council, comprised of senior military legal officials, to hear appeals from the Boards of Review. *Articles of War* 50 (1949); Title II, Selective Service Act of 1948 (June 24, 1948); Pub. L. 759, 80th Cong.; 62 Stat. 627.

Finally, with the adoption of the Uniform Code of Military Justice in 1951, Congress abolished the Judicial Council and, in its place, created the Court of Military Appeals, a three judge civilian appellate tribunal with jurisdiction to review the findings of a Board of Review.

Thus, during 40 years and two world wars, appellate jurisdiction over serious court martial offenses has been transferred from a field commander without legal training to an independent civilian court. The establishment of a

civilian court to oversee military justice has rightfully been hailed as among the most significant steps in the history of military jurisprudence. Brown, *The Crowder-Ansell Dispute, supra.* At issue herein is whether this newly evolved civilian appellate procedure is to be reduced, in many cases, to a meaningless exercise in futility. For, if a military prisoner may be compelled to serve virtually his entire sentence in a maximum security military prison before his conviction may be reviewed by the civilian court, what meaningful purpose does that review serve?

The codifiers of American military law have recognized that if appellate review is to be meaningful, the execution of the sentence being appealed must be deferred until the completion of appellate review. Thus, since the Continental Congress of 1776, whenever a court martial sentence has been subject to review by some higher authority, be it a convening field officer, a Board of Review, the Court of Military Appeals, Congress, or the President, military law has provided that execution of that sentence must be deferred until completion of the appropriate review. Frachter, *Appellate Review in Military Law,* 14 Mo. L. Rev. 15 (1949).[22]

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[22] The prohibition upon the premature execution of court martial sentences paralleled the evolution of the military appellate process. The British Articles of War of 1774 provided that no sentences of a general court martial could be executed until reviewed by the King or his designees. *British Articles of War* of 1774, Section 15, Articles 10, 12, 13, 14. [Reprinted in Davis, *Treatise on the Military Law of the United States* (2nd ed. 1909).]

On September 20, 1776, on the advice of General George Washington, the Continental Congress adopted an almost literal version of the British Articles of War. Section XIV, Articles 3, 5 provided:

> . . . no sentence of a general court martial should be put into execution until confirmed by Congress or the general or com-

As long as there has been an American military establishment, it has provided that court martial sentences, especially those involving heavy penalties, may not be car-

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mander-in-chief of the forces of the United States." 7 *Journals of Continental Congress* 265.

In 1786, the Congress of the Confederation repealed the 1776 Articles of War and adopted the following provision:

"But no sentence of a court martial shall be carried into execution until after [review by field commander], neither shall any sentence of a general court martial in time of peace, extending to the loss of life, the dismission of a commissioned officer, or which shall in time of peace or war respect a general officer, be carried into execution [until after review by Congress]. All other sentences may be confirmed and executed by the officer ordering the court to assemble . . ." 30 *Journals of the Continental Congress,* 316-322 (Article II).

Apart from substituting Presidential for Congressional review in 1796, no substantial change was made in the "non-execution" provisions of military law until the Act of July 17, 1862, which provided:

"And no sentence of death, or imprisonment in the penitentiary, shall be carried into execution until the same shall have been approved by the President." 12 Stat. 598.

In 1916, the re-codification of military law provided:

"No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer appointing the court . . ." Articles of War 46 (1916); 39 Stat. 650, 657-8.

* * * * *

"In addition to the approval required by article forty-six, confirmation by the President is required in the following classes of cases before the sentence of a court martial is carried into execution, namely:

[(a) sentences affecting general officers]

[(b) dismissals of officers]

[(c) dismissals of cadets]

[(d) death sentences]" *Articles of War* 48 (1916). 39 Stat. 650, 658.

The requirement of Presidential review of death sentences was inapplicable during time of war. This unfortunate omission permitted the occurrence of the "Houston Massacre." See p. 45 *supra.*

(continued on next page)

ried into execution until the appropriate appellate procedures have been exhausted. As we have seen, those appellate procedures have expanded during the first half of this century to include review by a legally trained civilian tribunal.

If military authorities are permitted to incarcerate military prisoners at Fort Leavenworth prior to the completion of appellate review, this painfully evolved appellate procedure will have been dealt a crippling blow. If respondents' position is sustained it will, in effect, negate 40 years of legal evolution. Once again, just as before World War I, meaningful review in most cases will be confined to the field officer who convenes the court martial, for his decision to "temporarily" imprison a military prisoner in a maximum security prison "pending appeal" will have the practical effect of forcing that prisoner to serve his sentence *de facto* prior to any decision on his appeal.

General Order #7, promulgated by the War Department in February, 1918, prohibited the execution of sentences extending to death, dismissal or dishonorable discharge until review by the Board of Review. Thus, General Order #7, for the first time, stayed the execution of serious court martial sentences pending review by a legally trained appellate tribunal.

In 1921, Congress once again re-codified military law incorporating the substance of General Order #7. See, generally, *Articles of War* 46, 48 and 51 (1921); 41 Stat. 787, 797.

In 1948, Congress provided that life sentences could not be executed prior to review by the Judicial Council. Sentences involving a dishonorable discharge or imprisonment in a penitentiary could not be executed until affirmed by a Board of Review. See, generally, *Articles of War* 47 and 48 (1948); 62 Stat. 627.

Finally, in 1951, Congress adopted the Uniform Code of Military Justice, which expressly barred the execution of death sentences, dismissals, dishonorable discharges and jail sentences of one year or more until the completion of military appellate review. Article 71, UCMJ; 10 USC §871.

B. *Article 71(c) and Its Consistent Interpretation*

Given the importance of Article 71 in protecting the integrity of the painfully evolved military appellate process, it is not surprising that whenever the issue has arisen, military appellate tribunals have ruled that Article 71(c) prohibits the imposition of penal incarceration until the completion of military appellate review.

In *United States* v. *Smith,* 2 CMR 817 (1952), the defendant was sentenced by a Court Martial to one year's imprisonment and a bad conduct discharge. The convening authority approved the sentence and ordered the defendant to the United States Disciplinary Barracks at Cumberland, Pa., suspending only the bad conduct discharge pending appellate review. The Board of Review stated:

> "The action of the convening authority insofar as it purports to order into execution that portion of the approved sentence involving confinement, unsuspended, for twelve (12) months is void." *Id.* at 822.

In *United States* v. *Ranes,* 3 CMR 550 (1952), *pet for rev den* 3 CMR 150 (1952), the Air Force Board of Review was faced with a defendant who had been sentenced to a dishonorable discharge and confinement to the Base Guardhouse at Reese Air Force Base for one year. The convening authority approved the confinement and ordered it executed. The Air Force Board of Review stated:

> "... the sentence of the court included confinement for one year, and the convening authority purported to order this sentence into execution, suspending only the execution of the dishonorable discharge. The Uniform Code of Military Justice, Article 71(c) provides that

no sentence 'which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more shall be executed until affirmed by the Board of Review and, in cases reviewed by it, the Court of Military Appeals.' The same prohibition is contained in ¶98 of the Manual for Courts Martial and is implicit in ¶88(d) of the Manual for Courts Martial . . . Therefore, that part of the action of the convening authority purporting to direct execution of the sentence is illegal." *Id.* at 551.

In *United States* v. *Moyer,* 3 CMR 667 (1952), the defendant was sentenced to one year's confinement. The Board of Review, citing Article 71(c) of the UCMJ, and ¶88(d) and ¶98 of the MCM stated:

"It is clear that the purported action of the convening authority ordering execution was invalid." *Id.* pp. 673-674.

The cases of *United States* v. *Sarae,* 9 CMR 633 (1953) and *United States* v. *Lucero,* 18 CMR 942 (1955) provide an excellent insight into the operation of Article 71(c) upon sentences of one year or more. In both cases, the defendants were convicted by court martial and sentenced to a substantial fine, or, imprisonment of one year. In *Sarae,* the convening authority approved the sentence and ordered the confinement executed until the fine was paid. The Board of Review held that since the one year's confinement was not punitive, but merely to compel payment of a fine, 71(c) did not prohibit execution of confinement prior to appellate review. In *Lucero,* however, the Board reversed its decision in *Sarae* and, ordering Lucero released from confinement, stated:

> "It is inescapable that where there is the possibility that the sentence may extend to a year or more, the sentence may not be executed by the convening authority until appropriate appellate review has been completed." *Id.* at 943.

See, also, *United States* v. *Garcia,* 17 CMR 88 (1954). The import of the *Sarae-Lucero* decisions is clear: No punitive incarceration may be imposed upon a military prisoner sentenced to one year or more until the completion of his military appeals.

In *United States* v. *Hightower,* 14 CMR 908 (1954), the defendant was sentenced by a Court Martial to one year's confinement and a dishonorable discharge. The convening authority approved the sentence and ordered it into execution. The Board stated:

> "The action of the convening authority in this case purports to order the sentence into execution. Since the sentence extended to a dishonorable discharge, total forfeitures and confinement at hard labor for one year, it cannot be ordered into execution until appellate review has been completed. Therefore so much of the action as purports to order the sentence into execution is illegal, void and a nullity." *Id.* at 911.

In *United States* v. *Johnson,* 15 CMR 583 (1954), the Court stated:

> "So much of the action of the convening authority as purports to direct *execution* of the punishment of confinement and forfeitures is a nullity, since Article 71(c) of the Code forbids an order of execution as

> to any part of a sentence which includes confinement for one year or more until sentence has been affirmed by a board of review and the Court of Military Appeals." *Id.* at 584.

In *United States* v. *Emerson,* 20 CMR 434 (1955), the defendant was sentenced to one year's confinement. The convening authority reduced the sentence to eleven months and twenty-nine days and ordered it into execution. The Board stated:

> "It is evident that the reduction of the one year's confinement to eleven months and twenty-nine days was made in order to permit execution of the confinement portion of the sentence prior to completion of appellate review." *Id.* at 437.

On numerous other occasions, the military courts have recognized that execution of a sentence of one year or more prior to appellate review is prohibited by Article 71(c) UCMJ. E.g. *United States* v. *O'Malley,* 1 CMR 469 (1951); *United States* v. *Duggins,* 1 CMR 539 (1951); *United States* v. *Johnston,* 2 CMR 759 (1952); *United States* v. *Ansell,* 16 CMR 450 (1954); *United States* v. *Williams,* 16 CMR 717 (1954); *United States* v. *Mason,* 16 CMR 795 (1954); *United States* v. *Doyle,* 17 CMR 542 (1954); *United States* v. *Lock,* 36 CMR 72 (1965).[23]

The District Court below, in ruling that GCMO #13, purporting to order Captain Noyd into confinement in Fort

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[23] We have recited the unanimous military authority condemning the premature execution of a sentence to confinement in order to emphasize that the respondent convening authority clearly exceeded his statutory mandate when he purported to order Captain Noyd confined to Leavenworth pending appeal. Cf. *Oestereich* v. *Selective Service System,* 89 S. Ct. 414 (1968).

Leavenworth "pending appeal" violated Article 71(c) followed the holdings of the military courts when Judge Payne stated:

> "There is disagreement as to whether petitioner's incarceration at Fort Leavenworth would be for the sole purpose of safekeeping, or whether it would be considered execution of his sentence. It is the opinion of the Court that placing the petitioner in Fort Leavenworth would, in effect, constitute, in part at least, execution of the sentence. Petitioner's sentence includes a term of confinement for one year, and the Court holds that the respondents cannot execute such sentence until such review procedures as are mentioned in Article 71(c) are completed.
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> • • • • •
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> It is the Court's ruling that ... the order confining petitioner to Fort Leavenworth constitutes execution of his sentence and is void ..." 285 F. Supp. at 787, 788.

C. *The Meaning of "Execution" Under Federal Law*

The interpretation given to Article 71(c) by the military courts and by Judge Payne below[24] is in accord with the meaning which the Federal Courts have consistently ascribed to the term "execution."[25] In each situation when

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[24] The Court of Appeals for the Tenth Circuit, below, in its citation of the *Smith*, *Ranes*, and *Lucero* decisions, apparently is in agreement with this unanimous reading of Article 71(c).

[25] The decision of the Fourth Circuit in *Levy* v. *Resor*, 384 F. 2d 689 (1967), granting the Government's motion under former Rule 25 of the Rules of the Fourth Circuit for permission to transfer Dr. Levy to Leavenworth did not address itself to Article 71(c) at all. In fact, no argument under Article 71(c) was made to the

the issue has arisen, Federal Courts have held that a sentence to confinement is "executed" upon the initiation of penal incarceration.

In *Sweet* v. *Taylor,* 178 F. Supp. 456 (D. Kans. 1959), Judge Huxman was faced with the problem of defining the meaning of "execute" in military law. He stated:

> "To execute means to carry out, to perform. It does not connote to impose or to modify." *Id.* at 460.

Thus, if imprisoning Captain Noyd at Leavenworth is the *de facto* equivalent of "carrying out" any portion of his sentence to confinement, it constitutes a premature "execution" of his sentence.[26]

In *United States* v. *Murray,* 275 U. S. 347 (1928), this Court ruled that a sentence to confinement is executed upon the initiation of penal incarceration. Mr. Chief Justice Taft held that even one day's penal incarceration constituted the "execution" of a sentence to confinement.

In *Affronti* v. *United States,* 350 U. S. 79 (1955), this Court expanded the *Murray* doctrine and ruled that penal incarceration pursuant to the first of two consecutive sentences "executed" the second sentence as well. Cf. *Peyton* v. *Rowe,* 391 U. S. 54 (1968).

Fourth Circuit by either party. A proceeding challenging the lawfulness of Dr. Levy's confinement to Fort Leavenworth was initiated in June, 1968 and is currently pending in the Tenth Circuit. *Levy* v. *Dillon,* #78-68 (10th Cir. argued Jan. 21, 1969).

[26] The transparency of the attempt to "carry out" Captain Noyd's sentence to confinement is emphasized by the Staff Judge Advocate's Review of his Court Martial which explicitly designates "U. S. Disciplinary Barracks, Fort Leavenworth, Kansas" as his "Place of Confinement."

D. *The Effect of ¶21d of the Manual for Courts-Martial*

It may be argued that the incarceration of Captain Noyd in the Disciplinary Barracks at Fort Leavenworth would not constitute an "execution" of his sentence, but merely a form of "necessary restraint" authorized by Paragraph 21d of the Manual for Courts-Martial. Such a subterfuge should not be permitted to succeed. Military authorities, no more than any other authorities, may not do by indirection what they have been explicitly barred from doing directly. Cf. *Speiser* v. *Randall*, 357 U. S. 513 (1958). They cannot execute Captain Noyd's sentence in the guise of applying "necessary restraint."

We do not contend that Article 71(c) prohibits all post-conviction military restraint pending appeal in every case.[27] We do assert, however, that it does prohibit incarceration at Fort Leavenworth pending appeal.

The United States Disciplinary Barracks at Fort Leavenworth is a maximum security military prison. *Manual for the Guidance of Prisoners: United States Disciplinary Barracks, Fort Leavenworth, Kansas* (1967 ed.) (hereinafter "*Manual*"). Persons confined to Fort Leavenworth are prisoners in the most literal sense of the word. At Leavenworth an officer-prisoner sleeps in a room with bars on his windows. *Manual*, Paras. 17; 54. He is unable to regulate his hours of meals or sleep. *Manual*, Para. 24. He is constantly under surveillance by armed guards. *Manual*, Paras. 10; 23. He is required to dress in prison garb. *Manual*, Para. 58. He is restricted to corresponding with five

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[27] See Point III, *infra* pp. 57-64 for a discussion of the scope and nature of post-conviction restraint available under the Uniform Code of Military Justice.

persons approved by the Prison Commandant. *Manual,* Para. 37. All his mail, incoming and outgoing, is censored. *Manual,* Para. 36. His reading matter is closely scrutinized and he is unable to subscribe to periodicals of his choice. *Manual,* Para. 38(d). He is permitted visitors only if they appear on his approved list of five correspondents. *Manual,* Para. 35. To argue that confinement to such an institution is merely "necessary restraint" rather than the execution of a prison sentence is, to say the least, an exercise in cynical semantics.

POINT III

The confinement of Captain Noyd at Cannon Air Force Base "pending appeal" violated the Uniform Code of Military Justice.

From his sentencing on March 9, 1968 until December 24, 1968, when he was ordered released by Mr. Justice Douglas, Captain Noyd was confined at Cannon Air Force Base. From March 9, to early June, he was confined to his own quarters and forbidden to leave them without permission. From June 6 to December 24, he was confined to a room at the Visiting Officer's Quarters. See App., p. 32. To the extent that Captain Noyd's confinement at Cannon Air Force Base was not reasonably required to insure his presence, and was, therefore, punitive, it constituted the premature execution of his sentence to confinement in violation of Article 71(c) and Article 13 of the Uniform Code of Military Justice and Paragraph 18b(3) of the Manual for Courts Martial.

It may be argued that confining Captain Noyd at Cannon Air Force Base was not punitive, but merely reflected the

"necessary restraint" authorized for post-conviction military prisoners by Paragraph 21d of the Manual for Courts Martial. However, a review of the applicable provisions of the Uniform Code of Military Justice, read in conjunction with the facts of this case, indicates that any form of physical confinement of Captain Noyd pending appeal would be unlawful.

Article 13 of the Uniform Code of Military Justice, 10 USC §813 provides:

> "No person, while being held for trial or the *result of trial,* may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, *nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence . . .*" (emphasis added)

In *United States* v. *Teague,* 12 CMR 73 (1953) and *United States* v. *Petroff-Tachomakoff,* 19 CMR 121 (1955), the Court of Military Appeals has construed the phrase "held for . . . the result of trial" in Article 13 to include post-conviction military personnel who were awaiting the results of the military appellate process.[28] The Court held that paragraph 21d of the Manual for Courts Martial was the regulation which authorized commanders to impose "neces-

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[28] The Court of Military Appeals' reading of the phrase "result of such trial" as including persons awaiting the results of the appellate process is consistent with the use of the word "trial" elsewhere in the UCMJ. Article 44(b) UCMJ, dealing with double jeopardy, states:

> "No proceeding in which an accused has been found guilty by a court martial . . . is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed."

sary restraint" upon post-conviction military personnel pursuant to Article 13 UCMJ. Since Article 13 is the foundation for the authority under MCM ¶21d, it follows that any "arrest" or "confinement" imposed pursuant to paragraph 21d may not:

> "be any more rigorous than the circumstances require to insure [defendant's] presence." *Article 13, UCMJ.*

Therefore, if the confinement to which Captain Noyd has been subjected pending the completion of his appeals is more rigorous than would be reasonably required to secure his physical presence, such confinement is unauthorized and illegal, since it is punitive in nature.

In *United States* v. *Teague,* 12 CMR 73 (1953), the defendant had been convicted of being AWOL. He was placed under at-large arrest on the military base pending the completion of his appeals. The Court approved the imposition of this minimal post-conviction restraint, stating that given the defendant's past history of AWOL, it was reasonably necessary to secure his physical presence pending appeal. In *United States* v. *Petroff-Tachomakoff,* 19 CMR 121 (1955), the Court affirmed the imposition of "base restraint" upon a defendant awaiting appellate review of a court martial conviction. The Court found that the restraint was reasonably necessary to insure the defendant's physical presence. The Court specifically noted that the restraint imposed in *Petroff-Tachomakoff, supra,* was minimal.

In both of these cases, the Court's holding is based on the explicit assumption that if post-conviction restraint were not necessary to secure the defendant's presence, it would be totally unjustifiable and unlawful.

Paragraph 18b(3) of the Manual for Courts-Martial (1968 ed.)[29] restates the exact language of Article 13 of the Uniform Code of Military Justice, which prohibits the imposition of restraint upon an accused awaiting the results of his appeal "more rigorous than the circumstances require to insure his presence." Thus, under paragraph 18b(3) of the MCM, confinement may not be imposed pending appeal unless reasonably necessary to insure the physical presence of the accused. In addition, paragraph 18b(3) states:

> "Other than restraint administered as prescribed in this subparagraph (18b(3)) [restraint reasonably required to insure physical presence], ... no punishment may be imposed upon an accused as a result of trial by court-martial until the sentence has been approved and ordered executed."

It is respectfully submitted that it is absolutely impossible to square the confinement imposed upon Captain Noyd pending appeal with the mandatory provisions of the UCMJ and the MCM.[30] The confinement was nothing

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[29] The 1968 edition of the Manual for Courts-Martial superseded the 1951 edition, which contained the identical provisions.

[30] In *Levy* v. *Resor*, 37 CMR 399 (1967), the Court of Military Appeals held that a prisoner might, under certain circumstances, be confined to quarters pending appeal. However, in *Levy* confinement was defended by the military as necessary to insure Levy's physical presence. It was alleged, on remote hearsay, that Levy planned to flee the country if freed pending appeal. Unfortunately, no evidentiary hearing on these allegations was ever afforded Dr. Levy, who has vigorously denied them.

No one has ever intimated the slightest fear that Captain Noyd would not obey the mandate of an appellate tribunal. There simply never has been any reason for Captain Noyd's confinement, other than a desire to impose summary punishment.

less than an attempt to punish Captain Noyd prior to a decision on his appeal in express violation of Article 71(c) and Article 13 UCMJ and ¶18b(3) MCM.

Since the incarceration imposed upon Captain Noyd was neither "necessary" nor "required to insure his presence," it follows that such incarceration was punitive in nature. As such it clearly violated the strictures of military law prohibiting the execution of sentences of more than one year's confinement prior to the completion of the appellate process.

We do not contend that the military lacks the power to impose some form of post-conviction restraint pending appeal in the appropriate case. If it is reasonably necessary to insure the physical presence of a defendant, certainly restraints may be imposed. In fact, military law provides a sophisticated array of restraints which may be imposed upon a prisoner whose appeals are pending. A military commander may choose between placing a prisoner in a status of "arrest" or placing him in physical "confinement." Article 9(a) UCMJ; Para. 18a MCM. By placing a post-conviction prisoner in "arrest" a commander imposes moral restraints upon his freedom of action. Since the 1921 recodification of the Articles of War, the military has recognized "arrest" or "restriction" as a means of imposing restraint short of physical confinement. See, paragraph 139a MCM (1928 ed.); paragraph 19b & 19c MCM (1949 ed.); paragraph 20 MCM (1951 ed.); paragraph 20 MCM (1968 ed.). In a case such as the present one, if any restraints at all were necessary, the moral restraint of "restriction" was certainly sufficient. Anything more onerous, such as the physical confinement to which Captain

Noyd was subjected, is greater than is necessary to insure his physical presence and is, therefore, illegal.

We respectfully suggest, therefore, that the proper procedure in this case would have required respondents to do the following:

a) Make a determination after trial as to whether any restraints at all were necessary to insure Captain Noyd's presence at the completion of the appellate process.

b) If restraints were deemed necessary, to determine whether a form of "restriction" would be sufficient to insure Captain Noyd's presence.

c) Only if it were determined that "restriction" would not be sufficient to insure his presence, impose physical confinement upon Captain Noyd.

A fair reading of Articles 13 and 71(c) requires no less.

It may be argued that Article 57(b) requires that Captain Noyd be confined pending appeal because it provides that periods of confinement adjudged by a court martial are to run from the date of conviction. If Captain Noyd is released pending appeal, the argument continues, he will, in effect, serve his sentence while free of restraint because his sentence will continue to run. If there is, in fact, a conflict between Article 71(c) and Article 57(b), as Judge Payne observed, the conflict should be resolved in favor of the accused. However, no real conflict exists because this argument overlooks both the second portion of Article 57(b) which provides:

> "... but periods during which the sentence to confinement is suspended shall be excluded in computing the service of the term of confinement."

and the purpose of Section 57(b) as revealed by its legislative history.

It seems clear that to the extent to which Captain Noyd is free from physical confinement, his "sentence to confinement is suspended" and the running of his sentence is tolled. In *United States* v. *Bryant*, 30 CMR 133 (1961), the Court of Military Appeals held that the imposition of a new sentence by a second court martial suspended the running of a prior unexpired sentence. The Court stated:

> "... it is worthy of note that Congress did not mention all contingencies which would prevent an accused from being credited with time served." 30 CMR at 137.

One such contingency would certainly occur when a prisoner is released from confinement pending appeal.[31]

The legislative history of Article 57(b) indicates that it was intended to reverse the practice of confining certain prisoners pending appeal; but computing their sentences to run only from the date the convictions were affirmed on appeal. *Hearings before House Armed Services Committee* on H. R. 2498, 81st Cong., 1st Sess., pp. 1089-1090; House Report No. 491, 81st Cong., 1st Sess., p. 27. Thus, its purpose was not to compel all prisoners to be confined

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[31] *U. S.* v. *May*, 27 CMR 432 (1959) held that no probationary suspensions could be vacated without a hearing pursuant to Article 72. However, no reasonable person could contend that a stay of execution pending appeal, pursuant to Article 71(c), constitutes a probationary suspension. See, Cone, *The Death of the Technical Suspension*, JAG Journal (Nov.-Dec. 1959), p. 7.

pending appeal, but rather to insure that those prisoners whose activities make confinement necessary pending appeal receive credit for time served. *United States* v. *Bryant, supra,* 30 CMR at 138.

Thus, Article 57(b) provides no real obstacle to compliance with Articles 13 and 71(c).

POINT IV

The continued incarceration imposed upon Captain Noyd pending completion of the military appellate process deprived him of his liberty without due process of law since no tribunal—civilian or military—has accepted the responsibility of passing upon the merits of his defense.

Captain Noyd was convicted of willfully disobeying a direct order to train student pilots for duty in Vietnam. His principal defense was that his request for conscientious objector status or resignation from the Air Force had been wrongfully denied by the Secretary of the Air Force as a matter of law and that, therefore, the subsequent order with which he was confronted was unlawful. Cf. *United States* v. *Sigmon,* CM 416356, 1 SSLR 3054, 3055 (Army Board of Review, Jan. 2, 1968) (not yet officially reported).

However, by an unfortunate interaction between (1) the decision of the court below in *Noyd* v. *McNamara, supra;* (2) a violation of Article 71(c) of the Uniform Code of Military Justice; and (3) the decision of the court below in *Noyd* v. *Bond, supra,* petitioner served more than nine months in confinement, and he is yet to receive a hearing on the merits of his principal defense. The imposition of

penal incarceration *prior* to permitting any hearing on Captain Noyd's defense violated the most basic notions of due process of law.

Absolutely fundamental to a rational view of due process of law is the concept that no person may be compelled to serve a sentence to confinement prior to a hearing on his defense.[32]

A brief summary of Captain Noyd's strange and frustrating odyssey through the courts demonstrates that although he has served more than nine months of his one year sentence to confinement, no tribunal, civilian or military, has ruled on the merits of his principal defense.

Initially, Captain Noyd approached the United States District Court in Denver, Colorado, in March, 1967, when he was an Assistant Professor of Psychology at the Air Force Academy. Captain Noyd contended that his application for conscientious objector status had been unlawfully rejected by the Air Force and that he was in imminent danger of receiving an order which would conflict with his religious beliefs. Judge Doyle initially granted a preliminary injunction, staying the Air Force from placing Captain Noyd in a position where he would be forced by his religious beliefs to disobey an order. *Noyd* v. *McNamara,* —— F. Supp. —— (March 29, 1967). See Appendix, p. 48.

However, several weeks later, Judge Doyle dissolved the injunction, ruling that he lacked jurisdiction to con-

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[32] Lewis Carroll in "The Trial of the Knave of Hearts" has captured the bizarre quality of Captain Noyd's dilemma. The Red Queen insists that the proper procedure is "sentence first, verdict later." Unfortunately, that is precisely what has happened to Captain Noyd.

sider the merits of Captain Noyd's request for equitable relief. Judge Doyle held that Captain Noyd must present his claims to a court martial prior to seeking the assistance of the Federal Courts. Judge Doyle's decision was affirmed by the Tenth Circuit, which held that Captain Noyd:

> "has not exhausted the military process and has not been denied, nor can we anticipate that he will be denied, a full consideration of his constitutional rights within the complete scope of that process." 378 F. 2d 538, 539-540 (10th Cir. 1967).

This Court denied certiorari. 389 U. S. 1022 (1967). In his Memorandum in Opposition to the petition for certiorari in *Noyd* v. *McNamara*, the Solicitor General of the United States argued:

> "... if and when petitioner is actually confronted with an order and charged with disobedience of it, he will have the opportunity to present his defenses within the traditional framework of court-martial procedures, review boards, resort to the Service Secretary, and request for relief from the Court of Military Appeals." *Memorandum for the United States in Opposition*, p. 4.

Although petitioner contended that the federal courts would have been the appropriate forum to determine the lawfulness of the denial of his claim for conscientious objector status, prior to any court martial, cf. *Hammond* v. *Lenfest*, 398 F. 2d 705 (2d Cir. 1968), he accepted the refusal of the courts to acknowledge jurisdiction and prepared to present his defenses to a court martial, if necessary.

Shortly thereafter, Captain Noyd was indeed confronted with an order which conflicted with his religious beliefs and, as was predictable, he found himself before a General Court Martial at Cannon Air Force Base, Clovis, New Mexico.

In keeping with the rulings of Judge Doyle and the 10th Circuit and the authoritative statement of the Solicitor General, Captain Noyd strenuously attempted to raise his defense at his court martial. But the Law Officer ruled that, notwithstanding the assurances of the 10th Circuit and the Solicitor General, a military court martial lacked the power to determine whether Captain Noyd's application for conscientious objector status had been unlawfully denied. See *U. S.* v. *Noyd,* Record of Trial, p. 327.

The decision of the court martial was affirmed by an Air Force Board of Review which also disclaimed the power to determine Captain Noyd's defense. In its decision the Air Force Board of Review stated:

> "Our decision in ACM 20016, Dunn, —— CMR ——, decided 1 May, 1968, answers the contention that the Secretary of the Air Force made an error of law in denying the accused's applications under AFR 35-24 for classification as a conscientious objector. In *Dunn,* the defense likewise demanded a judicial review within the court martial system of a Secretarial determination that the accused was not entitled to an administrative discharge as a conscientious objector. We held:
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> > 'The obvious answer is that such judicial review was not within the jurisdiction of the court-martial which tried the accused. The jurisdiction of a court-martial is a very limited jurisdiction derived from

the power of the Congress, in Article I, Section 8, Clause 14, of the Constitution "To Make Rules for the Government and Regulation of the land and naval Forces."' [Citation omitted.]

"... it is the Federal, not the military, courts which have jurisdiction in a proper case to review proceedings under such military regulations to determine whether there has been substantive due process." [Citations omitted.] *U. S.* v. *Noyd.* See App., pp. 40-41.

The Air Force officers comprising the Board of Review —as well as the Air Force Law Officer on the general court-martial—concluded that they lacked jurisdiction to rule on Captain Noyd's defense. But other Air Force officers, the respondents herein, lost no time in confining him in spite of Article 71(c) of the UCMJ.

After Captain Noyd had successfully protested to the District Court for the District of New Mexico that his imprisonment at Leavenworth pending appeal was unlawful, the Tenth Circuit reversed, holding, once again, that Captain Noyd had not exhausted his military remedies. *Noyd* v. *Bond,* 402 F. 2d 441 (1968). Thus, the court below ruled that although it had, apparently mistakenly, remitted Captain Noyd to a defense procedure that did not exist, it would refuse to permit a federal court to save him from serving his sentence prior to being afforded any opportunity to secure a hearing on the merits of his defense.

While the Tenth Circuit and the Air Force Board of Review have mutually and respectfully deferred to one another "as nimbly as if dancing a quadrille," *Orloff* v.

Willoughby, 345 U. S. 83, 87 (1953), Captain Noyd has served more than nine months in confinement at Cannon Air Force Base (but for Judge Payne it would have been at Fort Leavenworth) before any court accepted the responsibility of telling him whether his underlying claim of conscience was valid.

The responsibility of the Federal judiciary to prevent the occurrence of the bizarre procedural dilemma into which Captain Noyd has been thrust is manifest. There can be no more classic use of the writ of *habeas corpus* than the prevention of "sentence first, verdict later."

POINT V

This case is not moot.

Captain Noyd was sentenced to one year's confinement on March 9, 1968. His "minimum release date," assuming maximum time credited for good behavior, was December 26, 1968. On December 24, 1968, Mr. Justice Douglas ordered Captain Noyd released from confinement, pending this Court's determination of his petition for a writ of certiorari, in order to prevent the appeal herein from becoming moot. 89 S. Ct. 478. On January 20, 1969, this Court granted Captain Noyd's petition for a writ of certiorari and continued Mr. Justice Douglas' order pending argument on the merits. 89 S. Ct. 692.[33]

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[33] In granting the petition for a writ of certiorari, this Court stated: "The petition for a writ of certiorari is granted and the case is placed on the summary calendar. The stay heretofore granted by Mr. Justice Douglas shall remain in effect pending the issuance of the judgment of this Court or until further order of this Court." See App., p. 29.

The Government, in its two memoranda submitted in opposition to the grant of certiorari, has suggested that, notwithstanding the action of Mr. Justice Douglas in ordering Captain Noyd released on December 24, 1968, and notwithstanding the action of the entire Court on January 20, 1969, in granting certiorari and continuing Mr. Justice Douglas' stay, the appeal herein is moot.

The Government contends that Captain Noyd's sentence continued to run despite the actions of this Court and, therefore, was fully served on December 26, 1968. The Government's mootness argument is premised upon Article 57(b) of the Uniform Code of Military Justice, 10 USC §857(b), providing that sentences adjudged by a court martial shall run continuously from the date of conviction.[34] Accordingly, so the Government argues, Captain Noyd's sentence continued to run after December 24, 1968, despite the efforts of this Court to toll it. Petitioner respectfully maintains that the suggestion of mootness is erroneous.

First, regardless of any contrary provision of military law, this Court possesses inherent power to preserve the *status quo* in order to protect its jurisdictional integrity. See *United States* v. *United Mine Workers of America*, 330 U. S. 258 (1947). Mr. Justice Douglas and ultimately the full Court sought, by ordering Captain Noyd released from confinement, to preserve the *status quo* as of December 24, 1968, in order to prevent this appeal from becoming moot. This Court's mandate may not be evaded by simply pretending that it has no effect, cf. *Cooper* v. *Aaron*, 358 U. S. 1 (1958). Certainly, the military estab-

[34] See discussion of the tolling problem, *supra*, pp. 62-64.

lishment cannot shield its actions from judicial scrutiny by asserting that sentences imposed by it may not be tolled, even by this Court in aid of its jurisdiction. See *Thompson* v. *Louisville,* 362 U. S. 199, 202, n. 5 (1960); *In re Bart,* 82 Sup. Ct. 675, 676 (1962).

Second, even apart from the inherent power of this Court to maintain the *status quo* in aid of its jurisdiction, the action of Mr. Justice Douglas, and ultimately the full Court, in ordering Captain Noyd released effected a tolling of his sentence under military law.

In *United States* v. *Bryant,* 30 CMR 133 (1961), the Court of Military Appeals ruled that Article 57(b) could not be mechanically applied to effect absurd results. The Court ruled that Congress had not exhaustively enumerated all of the contingencies which would toll the running of a sentence. Clearly, one such contingency must occur when an accused is temporarily ordered released by a court.

The Manual for Courts Martial recognizes that a prisoner does not earn credit for time served when he is free from confinement. ¶97c MCM. In fact, the third subparagraph of Paragraph 97c provides:

> "Periods during which the person undergoing such a sentence ... is erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal, shall be excluded in computing the service of the time of punishment."

In addition to release on *habeas corpus,* paragraph 97c provides that no credit for time served may accrue while

a prisoner is free after an escape or has secured his freedom through misrepresentation or fraud. Thus, it is plain that the rationale of 97c is that a military prisoner who has been freed from confinement may not receive credit for time served during the period of his release.[35]

Finally, the Government has contended that the incarceration to which Captain Noyd was subjected at Cannon Air Force Base did not actually constitute "confinement" and was, therefore, not tolled by Mr. Justice Douglas' order. The Government contends that Captain Noyd was subjected merely to a form of "arrest in quarters" rather than "confinement" and that, while it may be possible to toll a sentence to "confinement", it is impossible to toll a sentence to "arrest in quarters."

By any objective standard of measurement, Captain Noyd was subjected to a drastic deprivation of his personal liberty. He was ordered removed from his family quarters where he resided with his wife and two children and incarcerated in a room in bachelor officer's quarters; he was permitted to leave the room only for meals, and other specfied events such as chapel and a weekly 1½ hour exercise period; he was permitted to see his wife and children only twice a week; his visitors were rigidly controlled; he was not permitted to associate with any military personnel, even during his bi-weekly visiting period; he was required to notify base "Security Police Operations" whenever he left the room for any of the specified reasons; and he was subject to surveillance by armed security police. Merely labeling Captain Noyd's incar-

[35] The examples of "inoperative time" contained in ¶97c are explicitly non-exhaustive. They are merely examples which are designed to illustrate a general principle.

ceration as "arrest in quarters" cannot obscure the objective reality of his confinement.

In fact, the military authorities have consistently viewed Captain Noyd's status as that of "confinement." It is conceded by the Government that Captain Noyd is entitled to the maximum "good time" abatement from his adjudged sentence. It is only by taking such an abatement into consideration that the December 26, 1968, release date has been computed. However, pursuant to a joint Army-Air Force regulation, "good time abatement" is available only to prisoners serving sentences to confinement. AR 633-30; AFR 125-30. Therefore, by the admission of the military itself, the contention of the Government that Captian Noyd's incarceration was not "confinement" is untenable.

Even if Mr. Justice Douglas' order had not tolled the running of Captain Noyd's sentence, the appeal herein would not have become moot. *Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Peyton* v. *Rowe,* 391 U. S. 54 (1968); *Carroll* v. *President and Commissioners of Princess Anne,* 89 S. Ct. 347 (1968).

In *Bus Employees* v. *Missouri,* 374 U. S. 74 (1963), this Court refused to dismiss an appeal as moot when the underlying dispute which had precipitated the appeal remained unresolved, creating the possibility that the allegedly moot governmental action might be renewed in the future. See also, *South Pacific Terminal Co.* v. *I. C. C.,* 219 U. S. 498 (1911); *Carroll* v. *President and Commissioners of Princess Anne,* 89 S. Ct. 347 (1968).

Captain Noyd has been restored to duty pending the outcome of his military appeals. If this Court determines

that this appeal is moot, Captain Noyd would, once again, be subject to the very same cycle of order-refusal-court martial-illegal confinement which brought him to his present plight.[36] Captain Noyd's religious scruples remain unchanged. The refusal of the Air Force to grant him conscientious objector status remains unchanged. Just as in *Bus Employees, supra,* the underlying conflict remains unresolved. If he is ordered to perform duties in violation of his conscientious beliefs, he may once again face a General Court Martial. To argue that Captain Noyd lacks a "substantial stake", *Fiswick* v. *United States,* 329 U. S. 211, 222 (1946), in establishing that he may not be incarcerated until he has had an opportunity to appeal is to ignore the reality of his present status.

The vulnerability of Captain Noyd to a repetition of the illegal confinement to which he has already been subjected reinforces the wisdom of the "continuous circumstances" doctrine enunciated by this Court in *Bus Employees, supra,* and *Carroll, supra,* which permits review of governmental action of short duration which may be repeated in the future, without regard to technical notions of mootness.

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[36] Any contention that the passage of the Military Justice Act of 1968 has solved the problem of confinement pending appeal in the military is incorrect. The amendment to Article 57 UCMJ (10 U. S. C. §857), providing that prisoners may, in the absolute discretion of the convening authority, be released pending appeal, does no more than codify the already existing power of a commanding officer to release a military prisoner pending appeal. See *Levy* v. *Resor,* 37 CMR 399 (1967), ¶21d MCM. There is no attempt to define the nature and extent of the restraint, if any, which may be imposed pending appeal if a convening authority chooses not to utilize the new 57d. Thus, the asserted power to impose incarceration pending appeal is not diminished by 57d.

In any event, the statute is of no application at all to petitioner, to the large number of military prisoners presently in confinement pending appeal, and to any other servicemen who may receive a court-martial sentence of one year or more between now and the effective implementation of the new statute.

CONCLUSION

The judgment of the Court of Appeals should be reversed. So much of the judgment of the District Court as barred respondents from confining petitioner at the United States Disciplinary Barracks at Fort Leavenworth, Kansas should be reinstated. So much of the judgment of the District Court as permitted respondents to incarcerate petitioner at Cannon Air Force Base, New Mexico should be reversed.

Respectfully submitted,

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February 26, 1969

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* Attorneys for petitioner express their appreciation for the valuable research assistance of Mr. Roger Dunwell, third-year student at New York University School of Law.